OF CONCERN TO PAINESVILLE—OR ONLY TO THE STATE: HOME RULE IN THE CONTEXT OF UTILITIES REGULATION

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I. INTRODUCTION

In the continuing and oftentimes uneasy relationship between state and municipal government, problems seldom remain settled and new ones can be expected to arise.[1] At times, the basic structure of this relationship may be drawn into question. And for those who would be farsighted, problems only yet on the horizon, may still be discernible.

Into this dynamic field of law comes the 1968 Ohio Supreme Court decision of *Cleveland Electric Illuminating Co. v. Painesville*.[2] The immediate concern of the case was the relationship between the state and its municipal corporations with respect to the reasonable regulation of intercity high voltage electric transmission lines. In its broader significance, the decision questions the continuing validity of the "general laws" concept as the determiner of state authority to overturn municipal exercises of the police power. Even the scope of the municipal police power becomes a matter for renewed interest since the case also focuses attention on the struggle to determine which are matters of "local" and which are matters of "statewide" concern.

Underlying these concerns is the basic question of whether or not the state can clear up a portion of the police power field of all regulation—a problem that until now has been resolved in the negative and has been recently described by two authorities as Ohio "abhors a vacuum."[3] It is in regard to this question that the no longer remote problems of state, municipal corporation *and* metropolitan area relations can be brought most sharply into focus. Should the state's admittedly broad police powers be further expanded to permit it to deal with area problems on a comprehensive basis freed from the direct application of municipal regulations within corporation limits or their indirect effects in surrounding territory?

Whether the decision in *Painesville* is destined to be treated as an answer to all of these concerns awaits, of course, the future. It is, nonetheless, the purpose of this article to hazard some assessment of the importance of the decision, both as to its immediate consequences and as to the light it sheds on the validity of permitting the judicial process to meet,

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[1] For a resumé of the shifts in the area of law as of 1960, see Blume, *Municipal Home Rule in Ohio: The New Look*, 11 W. RES. L. REV. 538 (1960).

[2] 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

[3] F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 374 (1970).

without resort to constitutional amendment, the need to reconcile past constitutional theories to present problems of local government.[4]

II. Outline of Relevant Home Rule Concepts

A redistribution of power between the state and municipal governments took place in Ohio with the acceptance of municipal Home Rule through the adoption in 1912 of article XVIII of the state constitution.[5] Traditionally municipal governments had been treated as creatures of the state, possessing no inherent authority, but subject to the state both for their existence and for their powers.[6] By Home Rule all municipal corporations became nearly independent of the General Assembly in the acquisition of power[7] and, to varying degrees, in its use.[8] This constitutionally granted power was considered to be self-executing,[9] that is, no intervening legislation was necessary before it could be used; and after an interval of 10 years, it was also found that the power could be exercised directly by ordinance without the need for a popularly adopted municipal charter.[10]

Home Rule consists of all powers of "local self-government" and "local police regulations."

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.[11]

This provision is thought to include all power for governing a municipality that the state could exercise within the territory of the municipal

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[4] A role, when it reaches constitution making, that the court early disclaimed any intention of assuming, State *ex rel.* Toledo v. Cooper, 97 Ohio St. 86, 91, 119 N.E. 253, 254 (1917).

[5] OHIO CONST. art. XVIII, § 3, power of "local self-government" and power to make "local police regulations;" § 4, power to acquire and operate a public utility or contract for its services; § 6, power to dispose of surplus service of a municipally owned utility; § 7, power to frame a charter for its government; § 10, power to make excessive condemnation for public use; § 11, power to access benefitted property for the cost of a public improvement; and, § 12, power to issue mortgage bonds for the acquisition, construction, or extension of a public utility.

[6] State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912); Ravenna v. Penna. Co., 45 Ohio St. 118, 12 N.E. 445 (1887). The opinion of Judge Wanamaker expressed in Youngstown v. First Nat'l Bank of Youngstown, 106 Ohio St. 563, 140 N.E. 176 (1922), Federal Gas & Fuel Co. v. Columbus, 96 Ohio St. 530, 118 N.E. 103 (1917) and in State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 125-131, 102 N.E. 670, 681-683 (1913) (dissenting opinion), that municipalities predated the state constitution and that they possessed inherent power did not represent the settled law of the state. This condition of dependency often led to state abuse. Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 305 (1960).

[7] Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

[8] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918) (as to "local police regulation" power); State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960) (as to "local self-government" power of non-charter municipalities).

[9] State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913).

[10] Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923) (disapproving a contrary view expressed in State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913)).

[11] OHIO CONST. art. XVIII, § 3.

corporation subject to the stated limitation and other constitutional provisions.[12] Evolving from early divergent views of the Supreme Court of Ohio,[13] the interpretation was established that local self-government and local police regulations are two separate grants of power. Broadly speaking, local self-government means power over matters which "by their nature and the field of their operation, are local and municipal in character,"[14] such as controlling the structure of government,[15] its operation,[16] the distribution of power,[17] and the selection[18] or election[19] of officials, as well as the exercise of such other basic powers as taxation,[20] contracting,[21] and eminent domain.[22] The power to make local police regulations, on the other hand, broadly approximates the state's police power exercised on the local level.[23] A recent decision combined the two grants of power into the single one of "local self-government," but without any discernible effect on the former scope of either.[24] Traditionally, Home Rule has been limited to the territorial boundaries of the municipality.[25]

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[12] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918); State *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919).

[13] In the early cases of Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918) (dissenting opinion), Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913) (concurring opinion), and State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913) (dissenting opinion) Judge Wanamaker expressed the view that "local self-government" included all power to conduct municipal affairs, including a municipal police power, and that "local police regulations" added, subject to limitation, the authority to exercise the state's police power within the limits of a municipality.

[14] State *ex rel* Toledo v. Lynch, 88 Ohio St. 71, 97, 102 N.E. 670, 673 (1913); *accord*, Mansfield v. Endly, 38 Ohio App. 528, 176 N.E. 462, *aff'd*, 124 Ohio St. 652, 181 N.E. 886 (1931).

[15] Hile v. Cleveland, 107 Ohio St. 144, 141 N.E. 35 (1923), *appeal dismissed*, 266 U.S. 582 (1924); Switzer v. State *ex rel.* Silvey, 103 Ohio St. 306, 133 N.E. 552 (1921).

[16] State *ex rel.* Cist v. Cincinnati, 101 Ohio St. 354, 129 N.E. 595 (1920).

[17] Harsney v. Allen, 160 Ohio St. 36, 113 N.E.2d 86 (1953).

[18] State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), *noted in* 20 OHIO ST. L.J. 152 (1959); State *ex rel.* Lentz v. Edwards, 90 Ohio St. 305, 107 N.E. 768 (1914).

[19] Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

[20] State *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919). *But see* OHIO CONST. art. XIII, § 6 and art. XVIII, § 13; State *ex rel.* Toledo v. Cooper, 97 Ohio St. 86, 119 N.E. 253 (1917).

[21] Babin v. Ashland, 160 Ohio St. 328, 116 N.E.2d 580 (1953); Hugger v. Ironton, 83 Ohio App. 21, 82 N.E.2d 118, *appeal dismissed*, 148 Ohio St. 670, 76 N.E.2d 397 (1947), *approved in* State *ex rel.* Leach v. Redick, 168 Ohio St. 543, 157 N.E.2d 106 (1959). *See also* State *ex rel.* Cronin v. Wald, 26 Ohio St. 2d 22, 268 N.E.2d 581 (1971).

[22] State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

[23] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918); Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913); Note, *Municipal Regulation of Business in Ohio*, 15 W. RES. L. REV. 195 (1963). It includes, after some confusion, the power to prohibit, Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied*, 357 U.S. 904 (1958).

[24] Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied*, 357 U.S. 904 (1958).

[25] Expressly as to police regulations, OHIO CONST. art. XVIII, § 3, "and enforce *within their limits* such local police . . . regulations. . . ." (emphasis added); Kigler v. Elyria, 2 Ohio

The limiting phrase, "as are not in conflict with general laws," has been interpreted to apply only to the power to make local police regulations,[26] leaving the local self-government power free from this limited type of state supervision. But in 1960 the supreme court held that an ordinance enacted under local self-government authority could not be sustained[27] if it was at "variance" with a general state law governing municipalities enacted under authority of Section 2 of Article XVIII of the Ohio Constitution[28] unless the ordinance was authorized by a charter adopted by the municipal corporation under Section 7 of that same article. A charter thus became a prerequisite to the full exercise of these powers of municipal self-government.

There being no judicial indication to the contrary, "conflict" as to local police regulations and "variance" as to local self-government seem to be synonymous.[29] In a long series of cases "conflict" has in general been interpreted to mean a "head-on collision" between ordinance and statute,[30] that is, one permits what the other forbids or vice versa. But if each forbids, whether less or more than the other,[31] or whether one imposes a lesser[32] or greater penalty than the other,[33] then there is "no conflict."

Other approaches to the definition of a "conflict" have been limited in application and are not entirely consistent with this basic formula. For instance, the Supreme Court of Ohio has recognized "conflict by implication," which arises when a prohibition is thought to permit that which is not forbidden.[34] The court has also recognized a conflict when the state

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App. 2d 181, 207 N.E.2d 389 (1965), State *ex rel.* Hanna v. Spitler, 47 Ohio App. 114, 190 N.E. 584 (1933), and impliedly as to local self-government, Cincinnati v. Rost, 92 Ohio App. 8, 109 N.E.2d 290 (1952), *appeal dismissed sub nom.* Reitz v. Morr, 158 Ohio St. 180, 107 N.E.2d 113 (1952). *Contra,* McDonald v. Columbus, 12 Ohio App. 2d 150, 231 N.E.2d 319 (1967).

[26] Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913); Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied,* 357 U.S. 904 (1958).

[27] State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960), *see generally* Duffey, *supra* note 6.

[28] "General laws shall be passed to provide for the incorporation and government of cities and villages. . . ." OHIO CONST. art. XVIII, § 2; *see* Fordham and Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 21 (1948).

[29] *See* Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964).

[30] This rule was first announced in Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923); *see generally* Vaubel, *Municipal Corporations and the Police Power in Ohio,* 29 OHIO ST. L.J. 29 (1968); Hitchcock, *Ohio Ordinances in Conflict with General Laws,* 16 U. CIN. L. REV. 1 (1942).

[31] Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

[32] Lorain v. Petralia, 8 Ohio L. Abs. 159 (Lorain County Mun. Ct. 1929).

[33] Matthews v. Russell, 87 Ohio App. 443, 95 N.E.2d 696 (1949); 13 OHIO ST. L.J. 111 (1952).

[34] Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944); Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929); Note, *Municipal Control of Liquor in Ohio,* 12 W. RES. L. REV. 377 (1961).

makes a crime a felony and the municipal corporation makes the same crime a misdemeanor.[35]

The "no conflict" approach, however, rules out any implied[36] or express denial[37] of municipal power by the General Assembly. Thus, the supreme court has rejected preemption, the creation of an exclusive area of regulation by state occupation of the field, as a basis for foreclosing municipal regulation. In addition, the evident illogic in allowing the General Assembly to deny expressly power granted to municipalities by article XVIII, § 3 has led the supreme court to repulse legislative attempts to do so.[38] This has taken the form of rulings defining the "general laws" with which a municipality cannot conflict under article XVIII, § 3 as being only those laws enacted by the General Assembly or those administrative orders adopted by a state board or commission, which regulate the conduct of citizens and not those which regulate a municipality in the exercise of the police power.[39] Excepted from this limitation, however, are those state laws, effective in absence of a municipal charter,[40] which are authorized by Section 2 of article XVIII for the establishment of rules for governing municipalities.

The constitutional scope of municipal police power has been held to be as great as that of the state,[41] but subject to the same limitations against unreasonableness[42] and arbitrary discrimination.[43] The courts, however, have classified certain subjects to be of "statewide concern." This was done first in an early case in order to stress that state sovereignty over sanitary matters was not limited by the Home Rule amendments and that

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[35] Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1958); Note, *The Status of Police Power of Ohio Municipalities to Enact Criminal Ordinances*, 14 W. RES. L. REV. 786 (1963).

[36] Cleveland v. Raffa, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968); Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962); Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939).

[37] West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918) (dictum).

[38] Cleveland v. Raffa, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968); Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939); Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962).

[39] West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929) (dictum); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918) (dictum); Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917) (dictum); Note, *Validity of Municipal Ordinances Prescribing Penalties Greater Than State Laws*, 20 U. CIN. L. REV. 400, 403 (1951).

[40] West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960).

[41] Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied*, 357 U.S. 904 (1958); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918); 3 J. FARRELL, FARRELL-ELLIS OHIO MUNICIPAL CODE § 9.3 (11th ed. 1962).

[42] Direct Plumbing Supply Co. v. Dayton, 138 Ohio St. 540, 38 N.E.2d 70 (1941); Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

[43] Frecker v. Dayton, 153 Ohio St. 14, 90 N.E.2d 851 (1950); Myers v. Defiance, 67 Ohio App. 159, 36 N.E.2d 162 (1940).

municipalities were thus not exempt from complying with state sanitary regulations.[44] Subsequently courts have used this designation as a recognition of the fact that certain matters were of particular interest to the state.[45] At times it would appear that the courts meant the "statewide concern" designation to identify areas of exclusive state jurisdiction,[46] while on other occasions it is more reasonable to believe that they were considering a matter to be one over which the state had supremacy in the traditional "no conflict" police regulation sense;[47] and on other occasions, such as in cases involving health regulations, more of a middle position has been adopted.[48]

Control of municipal streets has been handled in a different fashion. Broad authority was early found to support the notion that their location, establishment and maintenance is a matter of "local self-government,"[49] while the regulation of their use has fitted more conveniently within the scope of "local police regulation"[50] where municipal power is not exclusive. The power over municipal streets has been used to justify the municipal regulation of public utilities in their use of these streets, but not to the point of permitting conflict with state Public Utilities Commission (PUC) regulations.[51] This rationale was at first used to support municipal authority to fix rates charged by public utilities which were not in conflict with state Public Utilities Commission determinations.[52] On the other hand, municipal constitutional power to own or acquire public utilities or to contract for their services[53] was found not to authorize municipal rate-fixing by regulation.[54] However, that power was held to exempt from PUC

[44] Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929).

[45] Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), *overruled*, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958) (police and fire departments); State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940) (health); Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960) (relocation of state highway); Beachwood v. Board of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958) (detachment of territory). On the other hand, no difficulty has arisen in recognizing the local interest aspects relating to peace and order. Perillo, *Peace-and-Order Power of an Ohio Municipal Corporation*, 3 CLEV.-MAR. L. REV. 45 (1954).

[46] Beachwood v. Board of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929).

[47] State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941), *overruled*, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[48] State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940).

[49] Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919), *reaff'd in* Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961), *noted in* 23 OHIO ST. L.J. 557 (1962); Billings v. Cleveland Ry., 92 Ohio St. 478, 111 N.E. 155 (1915) (grant of franchise for location of utility lines).

[50] Niles v. Dean, 25 Ohio St. 2d 284, 268 N.E.2d 275 (1971); Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929).

[51] Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925).

[52] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918).

[53] OHIO CONST. art. XVIII, § 4. *See* Comment, *Public Utilities Under Home Rule*, 9 OHIO ST. L.J. 141 (1948).

[54] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918).

jurisdiction a rate agreed to by contract between a municipality and a utility.[55]

With this brief overview of the development of relevant Home Rule concepts in Ohio to serve as points of reference, the specifics of the *Cleveland Electric Illuminating Co. v. Painesville*[56] decision and the issues it raises may now be treated.

III. THE PAINESVILLE CASE[57]

The suit was instituted by the Cleveland Electric Illuminating Company (CEI) in the Common Pleas Court of Lake County for a judgment to declare whether the consent of the city of Painesville was needed for the construction through the city of three electric transmission lines of 345kV, 138kV and 33kV voltage levels for servicing the company's customers in a number of municipal corporations excluding Painesville. Consent of the city of Painesville had been sought but had been refused and during the pendency of this suit the city imposed an *underground* construction requirement. It passed Ordinance No. 18-65 forbidding the issuance of a permit for an electric line carrying over 33kV upon or across any street or public property within the city unless the city's plans called for such construction. CEI filed a supplemental petition seeking a declaration of the invalidity of this ordinance. The common pleas court found that the consent of the city was not necessary; that the construction of the lines was needed for CEI's intercity and interstate service; that the conditions of § 4905.65 of the Ohio Revised Code,[58] had been met; and that the cost of construction of the lines underground would be prohibitive.[59] The court of appeals affirmed these findings.[60]

The supreme court stated the primary issues of the case to be: whether a municipality could refuse permission for the construction of high voltage electric lines through the city for service of other municipal corporations and whether a municipality could regulate construction should it consent.[61]

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55 Interurban Ry. & Terminal Co. v. Public Util. Comm'n, 98 Ohio St. 287, 120 N.E. 831 (1918).

56 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

57 Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

58 OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970).

59 Cleveland Elec. Illuminating Co. v. Painesville, No. 42887 (Lake County C.P.), Brief for Appellant at 11-12, 12a, 13a, 15a, 16a, 15 Ohio St. 2d 125, 126, 239 N.E.2d 75, 76 (1968).

60 Cleveland Elec. Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967). The decision was based primarily on the conclusions that provisions of OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970), (1) serve as a limitation upon other power granting statutes, OHIO REV. CODE ANN. §§ 723.01, 715.27, 4933.14, 4933.16 (Page 1953); (2) did not deal with matters of local self-government, but with matters of statewide concern; (3) constituted a general law with which a city ordinance could not conflict; and (4) were violated by the Painesville ordinance since the latter unreasonably required more than the standard of reasonableness of the statute.

61 Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 127, 239 N.E.2d 75, 76-77 (1968).

The court first considered the claim that municipal Home Rule power[62] was violated by the provisions of § 4905.65 of the Revised Code, adopted in 1963, which exclude political subdivision control of intercity high voltage electric transmission lines of 22kV or more that are constructed according to accepted safety standards and do not unreasonably affect the welfare of the general public.[63] In event of a finding of the validity of § 4905.65, the court suggested that it would need to determine the effect of this statute upon the municipal consent provision of § 4933.16,[64] and its own 1959 decision, *State ex rel. Cleveland Electric Illuminating Company v. Euclid*,[65] in which it had held that an ordinance similar to that passed

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[62] OHIO CONST. art. XVIII, § 3. The claim that the municipal power to contract for public utility services conferred in OHIO CONST. art. XVIII, § 4 was violated, was objected to in Brief for Defendant of 4, in the later similar case of Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971), on the basis of Akron v. Public Util. Comm'n, 149 Ohio St. 347, 78 N.E.2d 890 (1948) which held that such a municipal contract is still subject to the exercise of the police power of the state.

[63] (A) As used in this section:

(1) 'Public utility' means any electric light company, as the same is defined in sections 4905.02 and 4905.03 of the Revised Code.

(2) 'Public utility facility' means any electric line having a voltage of twenty-two thousand or more volts used or to be used by an electric light company and supporting structures, fixtures, and appurtenances connected to, used in direct connection with, or necessary for the operation or safety of such electric lines.

(3) 'Local regulation' means any legislative or administrative action of a political subdivision of this state, or of an agency of a political subdivision of this state, having the effect of restricting or prohibiting the use of an existing public utility facility or facilities or the proposed location, construction, or use of a planned public utility facility or facilities.

(B) To the extent permitted by existing law a local regulation may reasonably restrict the construction, location, or use of a public utility facility, unless the public utility facility:

(1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and

(2) Is to be constructed in accordance with generally accepted safety standards; and

(3) Does not unreasonably affect the welfare of the general public.

Nothing in this section prohibits a political subdivision from exercising any power which it may have to require, under reasonable regulations not inconsistent with this section, a permit for any construction or location of a public utility facility proposed by a public utility in such political subdivision.

OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970), *noted in Public Utilities — Decreased Municipal Power to Regulate*, 15 W. RES. L. REV. 812 (1964).

[64] No person or company shall place, string, construct, or maintain a line, wire, fixture, or appliance of any kind to conduct electricity for lighting, heating, or power purposes through a street, alley, lane, square, place, or land of a municipal corporation without the consent of such municipal corporation.

This prohibition extends to all levels above or below the surface of such public ways, grounds, or places, as well as along their surfaces, but not to rights received through and exercised under proceedings of a probate court prior to February 26, 1910. The penalty provided by section 4933.99 of the Revised Code for a violation of this section is cumulative to other means of enforcing this section open to the municipal corporation, by way of injunction or otherwise, and is not exclusive. OHIO REV. CODE ANN. § 4933.16 (Page 1953).

[65] 169 Ohio St. 476, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960).

by the City of Painesville was not "an unreasonable regulation unrelated to the health, safety and welfare of the inhabitants of the municipality."[66]

In disposing of the Home Rule question first, the court concluded on the authority of *Beachwood v. Board of Education*,[67] which involved detachment of municipal territory, that if the effect of a municipal regulation, even of a matter of local concern, reaches the "general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest."[68] The court noted, citing *State ex rel. McElroy v. Akron*,[69] that matters can with changing times cease to be local and become statewide concerns and that the increase of intercity, as distinguished from intracity, transmission of electric current fits this pattern.[70] The court saw a need for the passage of general laws to prevent statewide matters from being "impeded by local regulation."[71] Finally, it held that § 4905.65 was a "law of general application" which was not invalidly in conflict with municipal Home Rule provisions of the Ohio Constitution because its provisions remove from "absolute local control" matters which relate to intercity transmission of high voltage electricity.[72]

With the establishment of the validity of § 4905.65 the court next turned to a consideration of the effect of this section on *Euclid*,[73] previously referred to,[74] and on § 4933.16,[75] which requires the obtaining of municipal consent as a precondition to the location of electric transmission lines within a municipal corporation. The court held that both were modified and not abrogated or repealed.[76] Section 4905.65, said the court, does not make unreasonable what had previously been held to be reasonable.

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[66] *Id.* syllabus para. 2. The court found municipal corporations to be specifically empowered to impose reasonable regulations with respect to the construction of electric power company lines by OHIO REV. CODE ANN. §§ 715.27, 4933.13, 4933.16 (Page 1953). In reaching its finding of reasonableness over three dissents, the court applied the traditional test stated in Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919), and took judicial notice of the dangers stretching high-voltage wires over public streets presents. The dissenters emphasized the fact that electricity can be transmitted safely and that the record for accidents involving high voltage lines in the area indicated that they were infrequent, non-fatal, and the result of highly exceptional circumstances.

[67] 167 Ohio St. 369, 148 N.E.2d 921 (1958).

[68] Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75, 78 (1968).

[69] 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed*, 371 U.S. 35 (1962).

[70] Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75, 78 (1968).

[71] *Id.* at 130, 239 N.E.2d at 78.

[72] *Id.*

[73] State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959).

[74] *Id.*

[75] OHIO REV. CODE ANN. § 4933.16 (Page 1953), set forth *supra* note 64.

[76] Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 130, 239 N.E.2d 75, 78 (1968).

Nor does it remove the power of a city to reasonably condition its consent to line location. Rather that section "excludes from the control of such subdivisions intercity lines"[77] meeting safety standards and not unreasonably affecting the welfare of the general public. But it "places control over such lines within the power of the municipality"[78] if they do not conform to statutory requirements.

Adopting the finding of the common pleas court,[79] acquiesced in by the city,[80] that the welfare of the general public would not be unreasonably affected in this case, the court held the Painesville ordinance inapplicable to CEI's line construction.[81] It did, however, note specifically that municipal planning commission approval might still be required in order that conformity with the city's overall plan be achieved.[82]

The only concurring opinion was by the late Chief Justice Taft.[83] In stating his point of difference from the majority, the Chief Justice concluded that the city had not claimed that § 4905.65 actually conflicted with municipal Home Rule and that the court's treatment of the issue "seem[s] to me to be inconsistent with our holdings . . . ."[84] Turning to his point of agreement, Chief Justice Taft noted that CEI had planned to construct its lines on its own land, except for the crossing of municipal streets and a park, and that as an electric public utility it had been granted the power of eminent domain and permission to construct lines by statute.[85] He suggested that § 4933.16 of the Revised Code,[86] which requires municipal consent to line location, was a subsequent qualification to the original authority of electric public utilities to install lines and that, as decided by the majority, § 4933.16 was itself modified by § 4905.65.[87]

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[77] *Id.* at 131, 239 N.E.2d at 79.

[78] *Id.*

[79] Cleveland Elec. Illuminating Co. v. Painesville, No. 42887 (Lake County C.P.), Brief for Appellant at 13a, 15 Ohio St. 2d 125, 126, 131, 239 N.E.2d 75, 76, 79 (1968).

[80] Brief for Appellant at 23a, 24a, Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 131, 239 N.E.2d 75, 79 (1968).

[81] Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 131, 239 N.E.2d 75, 79 (1968).

[82] *Id.* at 132, 239 N.E.2d at 79. The court did not discuss interstate commerce and equal protection issues raised by CEI. Brief for Appellee at 35-37.

[83] *Id.*

[84] *Id.* Justice Taft cited West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961); Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919); Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917).

[85] Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 133, 239 N.E.2d 75, 80 (1968). OHIO REV. CODE ANN. §§ 4931.01, 4933.14 (Page 1953), 4933.15 (Page Supp. 1970).

[86] OHIO REV. CODE ANN. § 4933.16 (Page 1953), *supra* note 64.

[87] Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 133, 239 N.E.2d 75, 80 (1968). The *Painesville* case has been followed in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,875 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971). The village passed

The net effect of *Painesville* is less power for Ohio municipal corporations; and the setting for this result was most compelling—extra-city interest and qualified statutory limitations. Involved are both intercity lines carrying a constant flow of electricity and a statute which uses reasonable safe construction standards and the lack of an adverse effect on the general welfare of inhabitants as the basis for its "exclusion" of municipal power. But despite the apparent appeal these aspects give to a curtailment of municipal power, the opinion does raise several serious questions with respect to state-municipal relations in Ohio. These questions can be summarized as: (1) To what extent does a municipality depend on the General Assembly of the state as the source of power to regulate a public utility? (2) Although not considered by the court, to what extent does state regulation of utilities serve as a limit on municipal regulation? (3) Is an "exclusion" of municipal power a "general law" within the meaning of Home Rule provisions? (4) To what extent does the concept "statewide concern" serve as a limit on municipal power? (5) What effect does this apparent increase of state power have upon the solution of metropolitan area, as distinguished from municipal, problems.

But before considering these questions by embarking upon a detailed examination of the legal significance of the *Painesville* decision, attention should be focused upon the practical results of the decision and upon the possibility that an alternative approach to that adopted by the court was available—an approach which would have avoided serious Home Rule effects.

IV. Reasonableness of Municipal Regulation

A. *Reasonableness in General*

The court in *Painesville* may have reached a conclusion which resulted in curtailed municipal power in order to avoid upholding what it may have considered to be ill-advised municipal actions. If so, the court might instead have tested those actions for reasonableness, since municipal actions

a zoning ordinance limiting future construction of high voltage lines to two additional lines unless present supporting structures were used or installation was underground. CEI, a supplier of electricity to both the village and other municipalities, planned a third and fourth line after the passage of the ordinance using existing right-of-ways but new supports. One line would cross village streets. Faced with the claim that § 4905.65 violated municipal Home Rule, the court followed *Painesville* in sustaining the statute and finding the ordinance valid as to local concerns but inapplicable insofar as the provisions of § 4905.65 were met. The court found the previous lines had not adversely affected village property values and that the general welfare of the inhabitants would not be adversely affected "to a greater degree than such lines would affect the general welfare of persons similarly situated," (at 7), while the cost of underground installation would be $3,234,800 compared with $348,720 for overhead installation. The court noted a municipal constitutional power over streets but it found municipal authority to regulate construction of intercity transmission lines was not part of Home Rule but rather, both it and the utility's right to make use of municipal streets granted by OHIO REV. CODE ANN.§ 4933.13 (Page 1953) were dependent upon statute. Finally it found that § 4905.65 was a statute of general concern which took precedence over local regulations.

are subject to the restraint of reasonableness both as an outer limit of Home Rule power and supplemental statutory power and as a consequence of the due process provisions of the fourteenth amendment of the federal constitution.[88]

A test for reasonableness in this context was provided in an early, often cited case:

> The means adopted must be suitable to the end in view, must be impartial in operation and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.[89]

This test had been applied to regulations claimed to be justified for their promotion of safety in *State ex rel. Cleveland Electric Illuminating Co. v. Euclid*[90] and was found to have been met. The ordinance there provided for the underground installation of high voltage electric lines through and into the municipality as a precondition to municipal consent to installation.[91] In upholding the ordinance as applied to a proposed 132 kV line, the court found over a vigorous dissent that high voltage lines, although common, still pose a great danger through possible failure of equipment or collapse of towers.[92] This conclusion was disputed by the three dissenters on the grounds that electricity is regularly transmitted safely above ground for light, heat and power purposes, that the line in question included automatic safety devices to cut the flow of electricity in case of damage, and that the incidence of loss of life and property through the years from such lines has been quite low.[93]

The court in *Painesville* refused to overturn the reasoning of the *Euclid*[94] majority. Perhaps it should have done so, rather than find as it did that § 4905.65 of the Revised Code modified the power of a municipality to withhold consent for the construction of such lines.[95] If it had retreated from *Euclid*, the court, while limiting municipal regulation, would have avoided, as shall be seen, all the difficulties attending scrutiny and eventual upholding of § 4905.65.[96]

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[88] E. B. STASON & P. KAUPER, CASES AND MATERIALS ON THE LAW OF MUNICIPAL CORPORATIONS 124, n.4 (3rd ed. 1959).

[89] Froelich v. Cleveland, 99 Ohio St. 376, syllabus para. 3, 124 N.E. 212 (1919).

[90] 169 Ohio St. 476, 480, 159 N.E.2d 756, 760 (1959), *appeal dismissed*, 362 U.S. 457 (1960).

[91] *Id.* at 477, 479, 159 N.E.2d at 758, 759; OHIO REV. CODE ANN. §§ 4933.13, 4933.16 (Page 1953).

[92] *Id.* at 480, 159 N.E.2d at 760.

[93] *Id.* at 483-86, 159 N.E.2d at 762-63.

[94] 15 Ohio St. 2d 125, 130, 239 N.E.2d 75, 78 (1968).

[95] *Id.*

[96] Counsel for appellant urged an alternative ground to the one adopted by the court which sought to avoid both the issue of retreating from *Euclid* and the one of overturning § 4905.65, Brief for Appellant at 6-8. They reasoned that because the provisions of § 4905.65 do not try to redefine what *Euclid* had held as reasonable, and, based on the lower court holdings, they permit

B. *Engineering Factors*

From an engineering standpoint underground installation of electric lines must be divided into two categories, low voltage, usually local distribution lines, and higher voltage, 69 kV and above, intercity transmission lines. Underground installation of low voltage lines is relatively common and presents few engineering or cost problems.[97] Such installation of high voltage lines is less common. Even though there are more than 1,600 miles of underground high voltage lines operational, this is less than one percent of the total of high voltage lines in the country.[98]

The technology for underground construction of high voltage lines has lagged behind that of overhead.[99] Among the problems created or enhanced are difficulties in removing heat caused by conductor and dielectric losses, lessening carrying capability as distance increases, and difficulties in making the transition from underground to overhead transmission.[100] Still, the increasing need in both amount and concentration of electricity and the economics of transmission impel use of constantly higher voltage lines.[101] In an industry-wide effort to keep pace with this trend, assisted by the formation of a special council and the cooperative interest of the federal government, a much needed acceleration of research into all facets of the problem is taking place and more is being proposed.[102]

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reasonable regulations, Painesville's ordinance which was identical to Euclid's should be sustained.

[97] ADVISORY COMM. ON UNDERGROUND TRANSMISSION, FPC 6 (1966) [hereinafter cited as 1966 ADVISORY REPORT].

[98] *Id.* at 1, 33.

[99] TRANSMISSION TECHNICAL ADVISORY COMM., NAT'L POWER SURVEY, THE TRANSMISSION OF ELECTRIC POWER (a report to the Federal Power Comm'n) 123 (1971) [hereinafter cited as 1971 ADVISORY REPORT].

[100] 1966 ADVISORY REPORT, *supra* note 97, at 13-14, 23.

[101] *Id.* at 4, 5.

[102] The Electrical Research Council (ERC) made up of representatives of public utilities and governmental agencies was formed in 1965 and in cooperation with the Department of Interior has expended some $30 million in research into improving power-transfer capabilities of state-of-the-art systems, cable splicing techniques, cooling systems, insulation for underground transmission and into developing long-life cables. For long range goals ERC seeks to bring into commercial use a system that has the potential of carrying four to ten times the load present cables carry and to reduce installation costs. A major seminar with ERC as co-sponsor was recently held at New England College, Henniker, N.H. to stimulate development of techniques to further underground transmission. Although some misgivings over public pressure for rapid expansion of the use of underground transmission were expressed by some industry spokesmen, governmental interest in advancing its use was evident even at the presidential level and the need for industry leadership was stressed. Detailed reports on the progress of research projects were presented. These covered self-cooled systems up to 765 kV, more troublesome forced-cooled systems of 400 and 500 kV; and more expensive and more problematical gas-filled cryogenic systems of both resistive and superconducting types at 345 kV. FRIEDLANDER, IS "POWER TO THE PEOPLE" GOING UNDERGROUND?, IEEE Spectrum 62-71 (Feb. 1972) [hereinafter cited as POWER TO THE PEOPLE]. Research is also going forward to reduce costs of installation, costs of "pothead" terminations for transition to overhead transmission, and to develop thermal monitor systems to permit greater use of conducting capacities of present cables without danger of failure due to degradation of the cable as a result of operation at abnormally high temperatures. *Id.* at 70-71.

Advances at the operational level have been made, particularly with respect to cables up to 138 kV.[103] Underground transmission from 69 kV to 138 kV voltage is said to be relatively common in Europe,[104] but the pace is slow in the United States with less than one-half a percent of high voltage lines constructed here, and none at the 345 kV level, going underground in fiscal year 1970.[105]

Although a continuing engineering challenge to underground construction is created by the constant increase of voltage in overhead transmission and, for the time being, while physical circumstances in specific situations

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Further federal government interest is evidenced by the proposed Power Plant Siting Act of 1971, S. 1684, 92nd Cong., 2d Sess. (1971), which calls for coordinating plans for, and governmental certification of, generating facility sites over 300,000 kW and transmission lines of 230 kV and over to prevent undue impairment of environmental values in meeting needs for electric power. Amendment 364 to this bill, introduced by Senator Magnuson (D. Wash.), August 3, 1971, provides for the establishment of a Federal power research and development trust fund, involving an estimated $300 million generated by a charge of .15 mills per kilowatt hour of electricity used to be paid by consumers, and producers of one million or more kilowatts for self-consumption. The fund is to be used to finance research into more efficient generation, transmission, distribution and consumption processes of electrical power, including the improvement of technology available to electric utilities, but also to decrease adverse environmental effects of both generation and transmission processes. Provisions for the dissemination of information resulting from the research is also made. 117 CONG. REC. 12922 (daily ed. Aug. 3, 1971).

Prior proposals calling for research into the effect on community planning, real estate values, tax revenues and natural beauty of overhead construction of transmission lines and for authorizing the Secretary of the Interior to encourage the use of underground transmission of electric power failed to pass. S-2507 and S-2508, 89th Cong.2d Sess. (1966).

[103] Although a complex oil impregnated insulation, NELSON, SOLID DIELECTRIC CABLE FOR TRANSMISSION AND SUBTRANSMISSION OPERATION 8, is used nearly universally today when high voltage lines are placed underground, 1966 ADVISORY REPORT, *supra* note 97, at 15, as it was in an 11-mile seven conductor 138 kV line beneath Long Island Sound, Gazzana-Priaroggia, Pisioneri, Marolin, *The Long Island Sound Submarine Cable Interconnection*, IEEE Spectrum 64 (Oct. 1971) [hereinafter cited as *Long Island*]. A less complex extruded polyethylene cable is proving useful up to 138 kV, POWER TO THE PEOPLE, *supra* note 102, at 66; 1971 ADVISORY REPORT, *supra* note 99, at 126; 1966 ADVISORY REPORT, *supra* note 97, at 15; KENNY, A LOOK AT SOLID DIELECTRIC CABLES RATED OVER 69 KV 2 [hereinafter cited as KENNY]. But it is claimed still to be experimental in SERVICE COMM'N OF COUNCIL, ROCKY RIVER, OHIO, A REPORT ON THE BURIAL OF HIGH VOLTAGE ELECTRICAL TRANSMISSION LINES IN ROCKY RIVER 8 (1971) [hereinafter cited as ROCKY RIVER]; Dep't of Public Utilities, Commonwealth of Massachusetts findings on Petition of Boston Edison Co. 14-17, 23 (June 12, 1968), in the Sudbury Mass. controversy ultimately won by underground adherents. Efforts to reduce costs through a lessening of time needed to splice this type of cable in the field are being made, POWER TO THE PEOPLE, *supra* note 102, at 67. The first 345 kV underground installation in the United States was made in New York City in 1964, 1971 ADVISORY REPORT, *supra* note 99, at 124, and is planned for submarine and underground installation in the Hudson Valley Storm King Mountain storage reservoir project, Consolidated Edison Co., Project 2338,33 F.P.C. 428, 438 (1965).

[104] SUDBURY POWER AND LIGHT COMM., DO WE HAVE TO BE UGLY? [hereinafter cited as UGLY]; KENNY, *supra* note 103, at 2. Although the transmission system of the United Kingdom is not, unlike that of the United States, in immediate need of expansion, research into thermal problems of underground transmission is being conducted and in specific instances lines up to 400 kV are being installed underground. POWER TO THE PEOPLE, *supra* note 102, at 63, 66-67.

[105] FED. POWER COMM'N, News Release (June 1, 1971). But 345 kV installation has been made, and considered, LONG ISLAND, *supra* note 103, at 64. 230 kV installation was minimal in 1970, FED. POWER COMM'N, News Release, *supra*, and was conceded as not practical due to a lack of technical research, SUDBURY POWER AND LIGHT COMM. 1970 Report.

may create serious problems, the greatest obstacle to raising the tempo of underground construction is not so much a lack of technology as it is a lack of a competitive technology, which could close the wide gap in costs between underground and overhead construction. Most objections to underground construction requirements,[106] as was true in *Painesville*,[107] are based on its high cost. The opportunity for cost reductions is substantial.[108] Considerable improvement in transmission equipment within the present state-of-the-art and the development of new materials as a result of research programs are considered likely.[109] However, prospects for a sizeable reduction in cost ratios will remain clouded until the high cost of cable installation, including as it does a large proportion for expensive labor, can be reduced through research into time-saving methods.[110]

C. *Safety Considerations*

With respect to structural safety the court would have been justified in departing from *Euclid*, given the comprehensive code of safety standards which has been adopted by the state Public Utilities Commission[111] to meet such problems and the concession on the part of the city of Painesville that the lines in that case would meet safety standards.[112] On the other hand, the possibility of accidents should also be considered. The dissenters in *Euclid* dismissed the hazards of overhead lines, including those of air transport, as unusual,[113] and the excavation hazards of underground lines have been suggested as at least equally as dangerous, particularly in uncongested areas.[114] Yet, with the frequent use of railroad right-of-ways and to a lesser extent the paralleling of highways, the danger

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[106] *E.g.*, Scenic Hudson Preservation Conference v. Fed. Power Comm'n, 354 F.2d 608, 623 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1962); POWER TO THE PEOPLE, *supra* note 102, at 62, 65; ROCKY RIVER, *supra* note 103; UGLY, *supra* note 104.

[107] Brief for Appellee at 5.

[108] 1966 ADVISORY REPORT, *supra* note 97, at 32.

[109] POWER TO THE PEOPLE, *supra* note 102, at 71; 1971 ADVISORY REPORT, *supra* note 99, at 149.

[110] 1971 ADVISORY REPORT, *supra* note 99, at 123; POWER TO THE PEOPLE, *supra* note 102, at 62, 64. A possible means for reducing labor costs would be the development of a cable designed to be "plowed in" rather than trenched. *Id.* at 70.

[111] Administrative Order No. 72 and Session Order No. 285, as amended (1966), incorporating "Safety Rules for Electric Supply and Communication Lines," Part 2 of National Electric Safety Code (6th ed.), National Bureau of Standards Handbook H-81.

[112] 15 Ohio St. 2d 125, 131, 239 N.E.2d 75, 79 (1968). A similar finding was made in an analogous case, Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971).

[113] 169 Ohio St. 476, 485, 159 N.E.2d 756, 762-63 (1959), *appeal dismissed*, 362 U.S. 457 (1960).

[114] Hooley, *Compulsory Underground Wiring—A Battle Rejoined in Public Utility Law*, 5 VILL. L. REV. 80, 90 (1959) [hereinafter cited as Hooley].

from collapse of towers or poles caused by vehicular accidents[115] and the increase of air traffic, particularly the use of small planes and helicopters, including those used for highway congestion reporting,[116] suggest not insignificant safety problems.

D. *Competing Economic Considerations*

1. Costs to the Utility

The disruptive effect of a regulation[117] is an element in the test for reasonableness that went largely unexplored in the court's opinion in *Euclid*, but which is often raised as it was in *Painesville*.[118] CEI's contention that the city's requirement amounted to a prohibition of construction in light of the high cost of complying with the ordinance was accepted by the trial court, unfortunately with only brief treatment of the feasibility of an alternative route.[119] The supreme court drew no conclusions based on findings of costs.

Estimates of costs vary rather widely[120] and may suffer from partisan bias since they are usually assembled by the utility company involved in the controversy. In 1966, however, an Advisory Committee to the Federal Power Commission[121] estimated that, although underground construction might well be competitive with overhead in the inner city, it is on the average nine times more expensive in the suburbs for 138 kV lines per kilowatt

115 1966 ADVISORY REPORT, *supra* note 97, at 25; ROCKY RIVER, *supra* note 103, at 4.

116 *E.g.*, Chicago Tribune, Aug. 11, 1971, at 1, col. 1, recounts the story of the death the day before of a pilot of a helicopter and a special police officer assigned to WGN radio station to report traffic congestion when the aircraft developed trouble and hit a 70 foot pole carrying a high voltage wire in the suburb of Bellwood, Ill.

117 "The means . . . must not interfere with private rights beyond the necessities of the situation." Froelich v. Cleveland, 99 Ohio St. 376, syllabus para. 3, 124 N.E. 212 (1919).

118 15 Ohio St. 2d 125, 126, 239 N.E.2d 75, 76 (1968), in the summarization of the trial court's finding.

119 *Id.* Brief for Appellant at 15a. Costs would be increased nearly nine fold, by $6,500,000, from $850,000 for overhead construction, to presumably $7,350,000 but the court dismissed alternative route construction with the statement: "The evidence shows that going around the city to the south would add substantially to the cost of the lines."

120 For 345kV the rate was estimated at approximately $4,500,000 per mile or about five times overhead construction in the Hudson Valley project, Consolidated Edison Co., Project 23338, 33 F.P.C. 428, 444 (1965), (later estimated at 16 times, Scenic Hudson Preservation Conference v. F.P.C., 453 F.2d 463, 477 (2d Cir. 1971)), and eight times overhead construction for both a 345 kV line and a 132 kV one in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971), compared with $3,700,000 per mile or nearly nine times overhead construction for three lines, 345 kV, 132 kV, and 33 kV in *Painesville*, Brief for Appelle at 5, 6. Costs for lower voltage lines from 110 to 138 kV the variations are similar: The Long Island Sound submarine oil filled 138 kV cable cost $900,000 per mile, *Long Island*, *supra* note 103, at 1, the utility's estimate in Sudbury, Mass. for underground construction of a 110 kV line was $625,000 per mile or about 4.2 times as expensive as overhead construction, Dep't of Public Util., Commonwealth of Mass., Petition of Boston Edison Co., Ex. C. (Jan. 29, 1971). CEI estimated Rocky River, Ohio Construction at $1,200,000 per mile for 138 kV or six times as expensive, ROCKY RIVER, *supra* note 103, at 6-7.

121 1966 ADVISORY REPORT, *supra* note 97, at 28.

transmitted and 16 times more expensive for a 345 kV line. In rural areas overhead construction expense is an even smaller fraction of underground costs.[122] The installation costs of underground lines are not likely to be offset by maintenance savings,[123] which are disputed[124] and limited by the fact that, although underground lines are less frequently affected by natural disasters, in the event of an outage experience shows repairs are more time consuming and more expensive than those to overhead lines.[125]

No breakthrough in cost reduction has yet been established[126] and it is claimed that the high proportion of labor costs in installation expenses lessens the chance that one will be found.[127] As a consequence, it is asserted that it is highly impractical to construct underground lines except for short distances and that there is a great likelihood that overhead transmission lines will predominate for some time to come,[128] particularly in rural areas. But even if presently valid, these conclusions are not final. Given the "encouraging" prospects for developing better transmission capabilities[129] and the breadth of the research being undertaken or proposed into all aspects of underground transmission, there would appear to be no real reason for pessimism. Moreover, even on the basis of present circumstances these views of impracticality only clarify and do not answer the type of problem presented in *Painesville*.[130]

No doubt in this practical world costs are a vital factor. It can be contended that the whole matter should be resolved on the basis of economics.[131] But for this to be true all "costs" must be included and some things are not to be reduced to mere monetary evaluation. For one point, it must be remembered that public safety, at least where appreciably affected, is not to be traded off against monetary expense.[132] Moreover, where a trade in costs is possible it should not be ignored. It has been suggested that if the not quite one percent of high voltage transmission lines now underground were increased to 100 percent, the electric bills of

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122 *Id.*

123 ROCKY RIVER, *supra* note 103, at 5-6, 11.

124 1966 ADVISORY REPORT, *supra* note 97, at 32; POWER TO THE PEOPLE, *supra* note 102, at 62-64.

125 1966 ADVISORY REPORT, *supra* note 97, at 25; UGLY, *supra* note 104. Improvement of fault-locating equipment should help alleviate this situation. POWER TO THE PEOPLE, *supra* note 102, at 70.

126 1971 ADVISORY REPORT, *supra* note 99, at 30.

127 *Id.* at 123. A possible source of cost reduction including those arising from use of labor could result from a careful planning of routes to avoid unfavorable soil conditions, congested traffic conditions or interference with other underground utilities. POWER TO THE PEOPLE, *supra* note 102, at 70.

128 Consolidated Edison Co., Project 23338, 33 F.P.C. 428, 446 (1965).

129 1971 ADVISORY REPORT, *supra* note 99, at 149.

130 *Painesville* itself involved a comparatively short distance of two miles and a suburban community, 15 Ohio St. 2d 125, 126, 239 N.E.2d 75, 76 (1968).

131 ROCKY RIVER, *supra* note 103, at 11.

132 Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (dissenting opinion).

the consumer would be more than doubled; while if 10 percent and 20 percent were buried, an 11.8 percent or 21.5 percent increase in costs of electricity would result.[133] It has also been estimated that by 1980 more efficient systems and lower fuel costs will reduce electric costs by 27 percent.[134] This means, subject to the inherent errors of prediction, that the burial of many miles of suburban lines would be achieved on the average at no extra cost to the consumer—a prospect which must be termed provocative.

Nor do installation costs tell the entire story. There are "costs" to the community, both economic and environmental, which motivate municipal restraints. These costs must be evaluated in monetary terms or as more preferred values as the case may be and, where appropriate, be balanced against the more obvious charges incurred by the utilities.

2. Environmental Costs to the Community

Scarring the landscape of a community raises a number of environmental costs, among which are the appearance of the supporting structures themselves,[135] the problems vacant land create in a municipality,[136] the decrease in property values adjacent to or near the right-of-way, and the obstruction of scenic or historical views. Aesthetics, after hesitant beginnings,[137] is becoming steadily more accepted within the cluster of police power goals[138] and is probably the factor raised most frequently by citizens protesting overhead transmission line construction.[139] Aesthetics has been held to be of sufficient importance to force a reconsideration of the approval of the important Storm King Mountain power project in

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133 1966 ADVISORY REPORT, *supra* note 97, at 33.

134 *Id.* at 12. Currently caught up in rising costs, taxes, and anti-pollution devise expenses, utilities are gaining disputably necessary rate increases. National Observer, Jan. 29, 1972, at 8, col. 1.

135 The need to redesign towers to meet as much as possible aesthetic considerations within economic and safety limits is recognized by the industry, Anderson, Zaffanella, Juette, Kawai, Stevenson, *Ultrahigh-Voltage Power Transmission*, 59 Proceedings of the IEEE 1548, 1556 (1971) [hereinafter cited *Ultrahigh*], as is exemplified in negotiations between CEI and suburban communities southwest of Cleveland, The News Sun (Berea, Ohio), Dec. 22, 1971, at 1, col. 1. Redesigning increases costs which narrows the overhead-underground installation costs gap. POWER TO THE PEOPLE *supra* note 102, at 64. More careful planning in making route selections for overhead lines is being suggested as a further aid in preserving the environment. *Id.* at 66. Even underground installation route selections are of significance since above ground transition facilities are involved at the terminals and intermediate cooling facilities may be. *Id.* at 70.

136 Use of some of such area as recreational parks was suggested by CEI in negotiations with suburban communities southwest of Cleveland, The News Sun (Berea, Ohio), Dec. 22, 1971, at 1, col. 1, at 8, col. 2.

137 Murphy, Inc. v. Westport, 131 Conn. 292, 40 A.2d 177 (1944); 1 C. ANTIEAU, LOCAL GOVERNMENT LAW § 7.25 (1968); 11 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.52 (3rd ed. rev. 1964).

138 Berman v. Parker, 348 U.S. 26 (1954).

139 *E.g.*, UGLY, *supra* note 104; ROCKY RIVER, *supra* note 103; POWER TO THE PEOPLE, *supra* note 102, at 62, 64.

the Hudson Valley when, in the judgment of a federal court of appeals, the Federal Power Commission had not given it sufficient weight in the initial granting of a construction permit.[140]

Of considerable economic importance, although of rather speculative nature, is the loss of property values resulting from overhead construction.[141] A form of noise pollution of perhaps more than annoyance importance can also result from this construction. Television and radio reception is disrupted at times[142] and even audible noise is created, particularly during wet weather.[143] Planning and zoning as well-established concerns of municipal authorities for the improvement of the modern municipality are also important considerations. Certainly a new transmission line right-of-way, or even a broadened one, or one involving tower rather than pole construction to accommodate the higher voltage lines can well be disruptive if not destructive of community goals.

3. Sharing of Environmental Costs

Should it be determined in a given case that these environmental and economic costs to the community outweigh the expense of underground construction, municipal requirements for such construction might still be subjected to further scrutiny. Who should reasonably share in the cost of preserving the environment? Increased costs will not be born by the utility but will, absent some other plan, be carried by all its customers, the consumers.[144] Is this base too narrow or too broad? To broaden it to include area municipalities' taxpayers does not seem feasible.[145] On the other hand, not all of the customers of a utility share equally in the benefits to be derived from underground construction. Those people ultimately served from such a line gain from the fact of transmission and not necessarily from the method of line construction. But it may be noted in

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140 Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 624 (2d Cir. 1965), *cert. denied sub nom.* Consolidated Edison Co. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966). Although granting a permit was approved upon the Commission's finding on remand that in light of costs and functional disadvantages underground construction ought to be ordered only where aesthetic detriment is "violent," 453 F.2d 463, 477 (1971).

141 A $4,500,000 or a 30 percent decline was alleged by the Sudbury Power and Light Comm., UGLY, *supra* note 104; but disputed by the Dep't of Util., Commonwealth of Mass., Petition of Boston Edison Co., at page 22, June 12, 1968. The court found no property value loss in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971).

142 *Ultrahigh*, *supra* note 135, at 1550.

143 *Id.* at 1552.

144 Some difficulty in computation of rates may exist until more definite figures on the relative durability of an underground line compared to an overhead line are available. Interview, David L. Pemberton, Secretary, Pub. Util. Comm'n, State of Ohio, Oct. 13, 1971.

145 The possibility of state assistance either through a rotary fund of state money made available to utilities for borrowing at a low rate of interest, or favorable state tax advantages for utilities might be explored.

another context that all the customers of a utility are likely to be forced to share in the cost of such things as smoke emission inhibitors at the generating plant, while only the municipality in which it is located gains the clear air.

Two methods of allocating costs present themselves if a narrower base is necessary. One method would limit increased rates solely to those property owners who are immediately affected by the line. This appears unrealistic both because it is unduly restrictive[146] and because costs in such an event would clearly be prohibitive. The second method would assess costs to only those customers who are served within the affected community. This method has both the attractiveness and the shortcomings of a compromise. It has the strength gained from common acceptance.[147] It is also the approach chosen by the State of Massachusetts recently in its precedent setting legislation for dealing with the problem of prohibiting construction and eliminating existing overhead lesser voltage distribution, as distinguished from transmission, lines.[148] Moreover, this method is the direction suggested for Ohio in legislation proposed as a modification of § 4905.65 of the Revised Code.[149]

E. *Conclusions To Be Drawn*

Underground installation requirements have been a feature of utility regulations since 1880.[150] Starting with distribution lines in congested areas, these requirements have generally been upheld on a safety rationale.[151] But the trend has been both to more restrictive regulation of distribution lines[152] and to attempts at limiting the more objectionable fea-

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146 Miller, *Public Utilities Underground*, 1 CAL. WEST. L. REV. 97, 109 (1965).

147 Hooley, *supra* note 114, at 93-98.

148 MASS. ANN. LAWS, ch. 166 §§ 22A-22N (1970). In the interest of public safety, health and welfare, new construction of overhead distribution lines (less than 20 kV) across or along municipal streets can be forbidden by a municipality and progressive removal of existing lines can be required. In the latter event, if the lines are needed a removal plan calling for the expenditure of two percent of the gross revenue of the utility from customers within the municipality may be submitted, and when approved a surcharge of two percent of total billing to each customer located within the municipality may be assessed by the utility. A utility may also agree with the municipality for the latter to replace overhead lines with underground construction upon the utility paying the municipality two percent of its gross annual revenue from customers within the municipality.

149 HOUSE BILL 779, introduced in the 109th General Assembly by Reps. Mayfield and Cruze, proposed the addition to the Ohio Revised Code of sections numbered 4905.66 through 4905.69. Section 4905.66 provided for the state Public Utilities Commission to ascertain where underground installation of distribution lines in nonpublic places is required by law, the cost difference between that installation and that contemporaneously utilized elsewhere "and shall allocate such difference equitably among all of [the utility's] customers served within such . . . municipal corporation." Such an allocation for transmission line construction costs under similar circumstances was proposed in § 4905.69.

150 Hooley, *supra* note 114, at 84.

151 *Id.* at 87.

152 *Id.* at 81, 89.

tures of transmission line construction.[153] In light of the considerations pointed out above, this trend even as to transmission lines cannot be dismissed as irresponsible. As a general proposition, it is difficult to state that municipal requirements for underground transmission lines are clearly unreasonable. These requirements are unreasonable in advance of the ability of the industry to conform. This may be the case today with respect to very high voltage transmission. Moreover, these requirements may be unreasonable if based on safe construction considerations when adequate safety standards already exist and are being met. On the other hand, when, in addition to the safety hazard of overhead lines, a comparison is made between the costs to the industry and ultimately to the public, including the environmental damage done by overhead transmission, the conclusion of unreasonableness is not quite so certain. This is especially true if provision is made for a fair distribution of the utilities' costs in the municipal legislation or in the rate-setting power of state utility commission. Certainly, the trend toward such municipal requirements, which must be viewed as increasing, suggests that the public is conscious of the harm to the environment and is becoming more willing to pay the bills necessary to avoid it.[154]

All of this does not necessarily mean that the Painesville ordinance was reasonable. Special circumstances must be noted. State safety construction standards did exist.[155] The ordinance in question barred even the higher voltage lines[156] and was not limited to those areas of the municipality where aesthetic harm and property devaluation might be significant.[157] In addition, aesthetic considerations were not apparent in the location of the proposed line.[158] Finally, the cost of underground construction could not be conveniently imposed on those who benefitted within the city since CEI did not service any of the inhabitants of Painesville.[159] For these reasons the court might well have avoided the problems posed by § 4905.65 by qualifying the *Euclid* decision to the point of finding the Painesville ordinance unreasonable.

F. *Section 4905.65 of the Revised Code versus Reasonableness*

An examination of the varied considerations that play their part in a single municipal regulation and a recognition of the changes the future

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153 *Ultrahigh*, *supra* note 135, at 1548.

154 UGLY, *supra* note 104. Although it is claimed that this is not universally true. Dep't of Pub. Util., Commonwealth of Mass., Petition of Boston Edison Co. 25 (Dec. 2, 1964).

155 *Supra* note 111.

156 Brief for Appellant at 26a-27a. Ordinance 18-65 made it unlawful to construct a power line carrying greater than 33 kV within the City of Painesville without obtaining a permit therefor based on the submission of plans calling for underground installation.

157 *Id.*

158 Brief for Appellee at 3. The line was to parallel State Route No. 2, a four-lane highway.

159 15 Ohio St. 2d 125, 126, 239 N.E.2d 75, 76 (1968).

might hold in a technical field serve to emphasize the difficulty in justifying the establishment of one uniform answer to the problems raised in *Painesville*, an answer which is statewide in scope and impervious to the passage of time. Variety and change serve to emphasize the localness of a problem.[160] As it now stands, however, § 4905.65 has been upheld as such an answer. This section does not seek to prevent ordinances which require that which is engineeringly unsound or even prohibitively expensive, because it applies to all lines, 22 kV and above, and to suburban and urban municipalities alike. It does not attempt to correct possible unfair distribution of costs because it does not relate to that consideration. Nor does this section consider the future.

On the other hand, § 4905.65 does deny a municipality the power to adopt regulations found reasonable in light of all the circumstances. Or does it? The section permits reasonable municipal regulation unless the lines are intercity, meet accepted safety standards of construction, and do not unreasonably affect the general welfare of the inhabitants of the municipality.[161] This is really no limitation upon municipal power if it can be said that a municipal exercise of police power would not be reasonable or—as it must be—if it is used to regulate that which does not pose an unreasonable threat to the general welfare of its inhabitants. But this is not a true expression of the limits of police power. Not only does it include the power to eradicate threats to the public well-being such as nuisances, but also the power to promote affirmatively that well-being through such measures as planning and zoning. In addition, § 4905.65 was certainly intended to serve some limiting purpose following, as it did, on the heels of the *Euclid* decision. It shifts the burden from the aggrieved party to show that the municipal regulation is unreasonable to the municipality to show that the regulated activity is an unreasonable threat to the inhabitants of the community.

But § 4905.65 does more than this. CEI contended for more[162] and the court in *Painesville* found more. There the court clearly overturned

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[160] In Massachusetts, the Department of Public Utilities can overrule a municipal refusal to permit a utility to cross its streets with a transmission line only where a majority of municipalities concerned or two adjoining municipalities have given consent. MASS. ANN. LAWS, ch. 166, § 28 (1970).

[161] "(B) To the extent permitted by existing law a local regulation may reasonably restrict the construction, location, or use of a public utility facility, unless the public utility facility: (1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and (2) Is to be constructed in accordance with generally accepted safety standards; and (3) Does not unreasonably affect the welfare of the general public. . . ." OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970).

[162] Brief for Appellee at 1, 16-18, and in later cases, Brief of Defendant at 3, Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971); Plaintiff's Trial Memorandum at 7, Cleveland Elec. Illuminating Co. v. Macedonia, No. 288331 (Summit County C.P.).

a municipal regulation that it refused to call unreasonable, and it specifically admonished the lower court for deciding differently.[163] It refused to hold that § 4905.65 made unreasonable what had been held to be reasonable in *Euclid*.[164] Based on a limited concession of counsel and on the finding of the trial court,[165] the supreme court permitted overhead construction for the reason that the construction did not unreasonably affect the inhabitants of Painesville.[166]

The principal casualties, then, of this legislation would appear to be the very local considerations which are most likely to be raised as counterbalances to a finding of economic interference with construction of an intercity transmission line. The promotional aspects of police power and control of the less clearly defined hazards to aesthetics, environment, municipal planning,[167] property values and noise pollution are no longer with-

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163 15 Ohio St. 2d 125, 131, 239 N.E.2d 75, 79 (1968).

164 *Id.* at 130, 239 N.E.2d at 78.

165 *Id.* at 131, 239 N.E.2d at 79. Counsel for Painesville had made the limited concession: "3. The proposed transmission lines described in the petition will not adversely affect the welfare of the general public to a greater extent than similar 33 kV, 132 kV and 345 kV overhead transmission lines which traverse areas similar to the areas in the City of Painesville to be traversed by the transmission lines described in the petition." Brief for Appellent at 24a. The finding of the court in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. 18, 1971) at 7 is of a similar vein: "such lines would not adversely affect the general welfare of the people of Walton Hills to a greater degree than such lines would affect the general welfare of persons similarly situated."

166 15 Ohio St. 2d 125, 131, 239 N.E.2d 75, 79 (1968).

167 The court in *Painesville* suggested that a municipality might still seek compliance with its overall community plan from the utility subject to review by higher governmental authority 15 Ohio St. 2d 125, 132, 239 N.E.2d 75, 79 (1968) and reject a utility proposal, but only if it would "so interfere with city planning as to affect the general welfare under § 4905.65(B)(3), REVISED CODE . . . ." *Id.* at 131, 239 N.E.2d at 79. Although not presented in its brief to the supreme court (Brief for Appellee, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968)), CEI contended that it was exempt from planning commission regulation by virtue of § 4905.65 at the trial level (Reply Brief for Plaintiff at 31, No. 42,887 (Lake County C.P.)) where it was rejected by the court (Brief for Appellant at 12, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968)) and in later cases, Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971) (Brief for Defendant at 10-11) and in Cleveland Elec. Illuminating Co. v. Macedonia, No. 288331 (Summit County C.P. 1969) (Memorandum for Plaintiff on Zoning Code applicability at 1). In the *Walton Hills* case *supra* CEI added the ground that provisions of OHIO REV. CODE ANN. § 713.02 (Page Supp. 1970) exempt public utilities from planning commission control. The court found that the interference with Walton Hills planning from use of an existing right-of-way would not be such as to adversely affect the general welfare of its inhabitants, *see* note 87 *supra*. In the *Macedonia* case *supra*, CEI added the ground that a public utility having the power of eminent domain is not subject to local zoning laws on the authority of Doan v. Cleveland Short Line Ry., 92 Ohio St. 461, 112 N.E. 505 (1915) (restrictive covenant and public utility); Norfolk & Western Ry. v. Gale, 119 Ohio St. 110, 162 N.E. 385 (1928) (restrictive covenant, mentioned zoning ordinance and public utility) and the State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied*, 344 U.S. 865 (1952) (state agency and zoning ordinance). The court accepted this contention. The applicability of local planning and zoning measures to public utilities possessing the power of eminent domain would appear to be essentially a question of the extent of state superiority which raises a "no conflict" problem. In the case of electric companies the problem is returned to the provisions of § 4905.65, REVISED CODE, as insofar as they are said to modify the municipal authority to regulate electric companies contained in the provisions of

in municipal power unless they reach the "unreasonable" or nuisance stage. Is this a necessary reconciliation of intercity and local interests? At this stage the test of reasonableness would appear to be adequate to limit errant municipal regulations, even as liberally applied in *Euclid*, particularly if a balanced distribution of costs were insured. Yet this test has been sacrificed; no provision has been made for the basic economic problems involved;[168] and it would seem that the scales have been weighted against local considerations to the point of making the meeting of safety standards all but determinative of the issue.[169]

Given the variety of local considerations in requiring underground construction and the opportunity to safeguard against burdening intercity service with the costs of local advantages, the constitutional validity of the provisions of § 4905.65 making the imposition of such a requirement in large part a state decision, becomes more clearly important to municipal autonomy. Moreover, given the means of preventing burdening intercity service, the advantages to be derived from underground construction, and the national trend toward acceptance of regulations imposing such restraints, the wisdom of such provisions as § 4905.65 is opened to question as well.

Having developed both the possibility that *Painesville* could have been decided on grounds of unreasonableness because of its peculiar facts and the presence of constitutional and policy misgivings over the breadth of the legislation which gave rise to the case, attention can now be directed toward the actual legal significance of the decision and the statute. How is municipal autonomy affected by each as to the source of power, freedom from state control, and scope of power? In balance, of what advantage is enhanced state power?

V. To What Extent Does A Municipality Depend on the General Assembly Of The State As The Source Of Power to Regulate a Public Utility?

The answer to this question is basic to any consideration of the problems raised in *Painesville*, for if the General Assembly is the source of municipal power on the subject, it would follow that any statutory modification of or limitation upon its exercise, including such provisions as are contained in § 4905.65 would be above objection. The court in *Painesville* suggested that this section "places control" in the city over lines meeting statutory standards[170] and counsel for CEI spoke of the legisla-

OHIO REV. CODE ANN. § 4933.16 (Page 1953) (*see* textual discussion accompanying note 322-33 *supra.*) For application to public bodies, see note 528 *infra.*

[168] A deficiency that HOUSE BILL 779, *supra* note 149, would correct.

[169] Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971).

[170] 15 Ohio St. 2d 125, 130, 239 N.E.2d 75, 78 (1968).

ture as "doling"[171] out power over utilities to municipalities. This approach may be based on any one of three theories: (1) the municipalities of the state had no authority previous to the enactment of statutes by the General Assembly; (2) what authority municipalities possessed is subject to modification by statute; (3) what authority municipalities have had has been lost, for example, through changes in circumstances. The first of these possibilities is the least likely basis for the suggestions made relative to the scope of state control, considering the context in which each was made.[172] Because it postulates maximum state power it can, however, serve as the logical starting point for the examination of state-municipal relations. The other two possibilities will be examined in connection with larger problems treated later in this article.

As a brief examination of judicial decisions in the area of state-municipal relations will quickly reflect, municipal dependency upon legislative authority to regulate public utilities, as suggested by CEI and stated in the supreme court's opinion in *Painesville*, cannot rest on the proposition that the initial source of such power has always remained in the state legislature. The source of municipal Home Rule is constitutional and not statutory.[173] Prior to Home Rule a municipal corporation was the creature of the legislature, to which it looked both for its existence and its powers.[174] In statutes dating from this era which are still part of the law of the state the right to regulate the use of municipal streets[175] and the construction and repair of electrical facilities was conferred in terms of grants of municipal power,[176] while the right to impose regulations on electric utilities[177] was conferred by means of a provision making munici-

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171 Brief for Appellee at 24, quoting from counsel for Appellant's treatise, 3 J. FARRELL, FARRELL-ELLIS OHIO MUNICIPAL CODE § 1.59 (11th ed. 1962).

172 The court was apparently thinking of power no longer "local" in nature and therefore subject to state control, 15 Ohio St. 2d 125, 129-30, 239 N.E.2d 75, 78 (1968), and counsel was apparently suggesting as alternatives either exclusive state power over that which is beyond Home Rule, Brief for Appellee at 25, or a type of state preemption of regulation within the Home Rule theory, Brief for Appellee at 24.

173 Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

174 State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912); Ravenna v. Penna. Co., 45 Ohio St. 118, 12 N.E. 445 (1887).

175 OHIO REV. CODE ANN. § 723.01 (Page 1953).

176 OHIO REV. CODE ANN. § 715.27 (Page 1953).

177 State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960); Cincinnati v. Diamond Light Co., 4 Ohio App. 177 (1915), involving the predecessor section OHIO GEN. CODE § 9193 (1938) to OHIO REV. CODE ANN. § 4933.16 (Page 1953). In pre-Home Rule cases a statute empowering a municipality to grant a franchise upon "regulations and restrictions" was construed as enabling a municipality to charge compensation of a gas company, for the use of municipal streets, Federal Gas & Fuel Co. v. Columbus, 96 Ohio St. 530, 118 N.E. 103 (1917) (involving OHIO GEN. CODE § 10129 (1938) now OHIO REV. CODE ANN. § 1723.02 (Page Supp. 1970)), and to fix utility rates by contract which are free from subsequent state alteration as part of the condition for its consent to a telephone company for the use of municipal streets, Columbus v. Pub. Util. Comm'n, 103 Ohio St. 79, 133 N.E. 800 (1921) (Marshall, C.J.) (involving, OHIO GEN. CODE § 9197 (1938) now OHIO REV. CODE § 4931.20 (Page 1953)).

pal consent a precondition to such a utility's use of municipal streets.[178] Prior to the enactment of these statutes a municipality was without power to regulate a public utility.[179] However, with Home Rule these statutes have become obsolete as a source of power, since[180] it has been repeatedly held from the earliest cases that Home Rule does include municipal regulation of public utilities whether directly[181] or in the context of a municipality's control over its streets.[182]

Caught up in Home Rule enthusiasm and frequently untempered by state legislative judgments as to the presence of state interests, the courts tended in early cases to emphasize the broad scope of this new constitutional power by finding municipal control of the use of the streets to be a matter of local self-government.[183] Before long a shift to a police regula-

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178 OHIO REV. CODE ANN. § 4933.16 (Page 1953). Counsel for CEI (Brief for Appellee, at 6-16, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968)), contended that OHIO REV. CODE ANN. § 4933.16 (Page 1953), was only a limited conferral of power to a municipality to deal with local electrical service matters and not one to deal with what amounts to the intercity aspect of the supply of electrical power. This contention, of course, only has significance in the present context if the statute is in fact the source of municipal authority. In that event it becomes either an unnecessary alternative argument to one urging the validity of § 4905.65, REVISED CODE, since this section is clearly a limiting statute and within state authority to adopt if the municipal power it limits is fully dependent upon the state legislature for its existence, or it raises a question as to the need for the passage of § 4905.65 at all, except for the unlikely purpose of *expanding* previously limited municipal authority.

179 Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 113 N.E. 402 (1916) *aff'd*, 251 U.S. 173 (1919). Also in pre-Home Rule cases it was held that the state had authority over municipal streets subject to delegation to a municipality, Corry v. Cincinnati, 10 Ohio Dec. Reprint 601 (Super. Ct. Cincinnati 1888), or to a county, Mills v. Norwood, 6 Ohio C.C.R. 305 (C.P. 1892). A municipal street could not be used by a public utility as a matter of right, Columbus v. Public Util. Comm'n, 103 Ohio St. 79, 133 N.E. 800 (1921), and even when use was authorized by statute the grant was subject to the municipal duty to care for the streets, Gas, Light & Coke Co. v. Columbus, 50 Ohio St. 65, 33 N.E. 292 (1893).

180 *See* textual discussion accompanying notes 5, 7 *supra.*

181 *E.g.*, Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918). References to statutory grants continue to be made which are at most confusing when the source of power is not in issue, *e.g.*, State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960); Cambridge v. Pub. Util. Comm'n, 159 Ohio St. 88, 111 N.E.2d 1 (1953). They are at times considered to be necessary, *see* 3 J. FARRELL, FARRELL-ELLIS OHIO MUNICIPAL CODE § 7.11 (11th ed. 1962). Yet they can be of significance if they serve to fend off what otherwise might be a finding of conflict with state regulations in the area. *See* 23 OHIO ST. L.J. 557, 560 (1962).

182 *E.g.*, Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923). References to statutory grants in conjunction with constitutional power, *e.g.*, Union Sand & Supply Corp. v Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961), and without direct mention of Home Rule authority, still appear, *e.g.*, Galion v. Galion, 154 Ohio St. 503, 96 N.E.2d 881 (1951). *See* Nelsonville v. Ramsy, 113 Ohio St. 217, 148 N.E. 694 (1925).

183 Two very early cases involving a state requirement (OHIO GEN. CODE § 9105 (1938) now OHIO REV. CODE ANN. § 4951.06 (Page 1953)) that the consent of abutting property owners be obtained before a municipality could authorize the extension of local service street railway lines, show the marked difference of approach where Home Rule powers were found applicable and where they were not. In Billings v. Cleveland Ry., 92 Ohio St. 478, 111 N.E. 155 (1915), the Cleveland charter provided against the consent requirement and this was upheld over the state statute because, "the granting of permission and the making of a contract to construct and operate a street railway in the streets of a city or village is a matter that may be provided for in a charter adopted by the municipality under article XVIII of the Constitution" (syllabus, para. 1) and "conferring . . . [a consent right by the state], being a matter

tion approach became evident with respect to such matters as rate-fixing for public utility service.[184] What remains now of the early local self-government approach is largely restricted to control over streets, as distinguished from utility regulation, and even then to their construction and maintenance[185] rather than the regulation of their use.[186]

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of local concern, when inconsistent with the provisions of the charter . . . would fall simply because it is inconsistent. . . ." *Id.* at 491, 111 N.E. at 168. Concern for municipal autonomy is even clearer in the trial court's treatment of the case, *sub nom.* Goebel v. Cleveland Ry., 17 Ohio N.P. (n.s.) 337 (C.P. 1915). In Carpenter v. Cincinnati, 92 Ohio St. 473, 111 N.E. 153 (1915), decided the same day, as *Billings, supra*, the city of Cincinnati not having a charter, when charters were considered necessary to the exercise of Home Rule powers (from State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913), to Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923)), proved fatal to a resolution of necessity to extend a line without consent to abutting owners. Since without Home Rule, the city was dependent upon the General Assembly for power and this power was considered modified by the statutory pre-condition consent provision. The *Perrysburg v. Ridgway, supra*, decision with Home Rule proponent Judge Wanamaker speaking shows some shift of emphasis. Although it was held that "[t]he power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term 'powers of local self-government.'" (syllabus, para. 2), it was not necessary to differentiate between local self-government and police power since, as noted by Judge Day in concurrence, conflict with a state statute was not in issue. The local nature of a regulation of intercity bus line stops to embark and disembark passengers within the city was stressed, and the question of the entire prohibition of the use of the streets was reserved. A strong plea for exclusive state control over this "non-local" type of regulation was made by the dissenter, Judge Jones. In the companion case of Murphy v. Toledo, 108, Ohio St., 342, 140 N.E. 626 (1923), a similar result was reached with respect to prescribing the route of intercity buses in the city in a similarly limited fact situation. Two, more recent, lower court cases, relied on *Perrysburg v. Ridgway, supra*, to find power of local self-government involved, but neither is a real test of that conclusion as conflict with state statutes was not in issue. Ricketts v. Mansfield, 43 Ohio App. 316, 183 N.E. 181, *appeal dismissed*, 125 Ohio St. 631, 185 N.E. 881 (1932), modification of a franchise with consent of a street railway company and involving municipal utility contract power contained in OHIO CONST. art. XVIII, § 4, but with the further suggestion that modification could have been made without consent under OHIO CONST. art. XVIII § 3, police power; DiBella v. Ontario, 4 Ohio Misc. 120, 212 N.E.2d 679 (C.P. 1965), conditions in a franchise to use municipal streets for supply of cable television, requiring conformity with municipal regulatory measures by a non-public utility.

[184] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918). In rejecting the local self-government clause of OHIO CONST. art. XVIII, § 3 as the source of power, the court found that this clause did not contain the local portion of a divisible police power, but that the police regulation clause of this section gained purpose only by being interpreted to encompass the full scope of an indivisible municipal police power, subject to the "no conflict" provision. Judge Wanamaker, in dissent, would have divided the police power between the two clauses leaving only the state portion when exercised by a municipal corporation subject to state control. OHIO CONST. art. XVIII, § 4, which confers power upon municipalities to acquire, or contract for the services of, a public utility, was rejected by the court, over dissent, as a source of regulatory power over a public utility. On the other hand, the Home Rule power to fix rates by contract with the utility was suggested in dictum in Columbus v. Public Util. Comm'n, 103 Ohio St. 79, 133 N.E. 800 (1921); found to be included in OHIO CONST. art. XVIII, § 4 in Columbus Gas & Fuel Co. v. Columbus, 42 F.2d 379 (6th Cir. 1930), but was subjected to charter limitations, and was also found to be part of OHIO CONST. art. XVIII, § 3 power in Cincinnati, N. & C. Ry. v. Cincinnati, 71 F.2d 124 (6th Cir. 1934).

[185] Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919). The court treated street maintenance as reflected in a vehicular weight limitation as a matter of business management of the city rather than as a control of the use of its streets. It thereby again refused to sanction Judge Wanamaker's theory of including some police power within local self-government or to subject street maintenance to the "no conflict" limitation as urged by the dissenter, Judge Jones. Predictions of confusion in the law as a result of the majority holding made by these two judges seems to have been born out in the contrary finding in a lower court case, Lakewood v.

Despite these shifts, Home Rule power remains the source of municipal authority over utilities. By rejecting a local self-government approach in favor of police regulation, the courts failed to make this municipal authority exclusive. Rather, each level of government can regulate and in case of conflict the state law prevails. Consequently, municipal regulation of utilities has been upheld in absence of conflict with state regulations as promulgated by the state Public Utilities Commission,[187] but the latter have been repeatedly upheld over inconsistent municipal ordinances.[188] This approach received renewed confirmation in a recent deci-

Johnson, 8 Ohio Op. 205 (Lakewood Mun. Ct.), *rev'd, appeal dismissed*, 133 Ohio St. 110, 11 N.E.2d 1022 (1937), a finding based on a procedural point in Perkins v. Quaker City, 165 Ohio St. 120, 133 N.E.2d 595 (1956), in reluctant reaffirmance in Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961), and in the use of maintenance case precedent to sustain an essentially police power objective, Cincinnati Motor Transp. Ass'n. v. Lincoln Heights, 25 Ohio St.2d 203, 267 N.E.2d 797 (1971). *Accord*, Wilson v. Springfield, 105 Ohio St. 647, 138 N.E. 927 (1922) (cleat and spike regulations); Massa v. Cincinnati, 51 Ohio Op. 101, 110 N.E.2d 726 (C.P. 1953), *appeal dismissed*, 160 Ohio St. 254, 115 N.E.2d 689 (1953) (street repairs). Maintenance regulations must still meet the tests of reasonableness, Gates v. Parma, 96 Ohio L. Abs. 18, 201 N.E.2d 814 (C.P. 1964); Vaughn v. Parma, 95 Ohio L. Abs. 6, 201 N.E.2d 722 (C.P. 1962), and of equal application, Western Trucking Co. v. Lincoln Heights, 19 Ohio App. 2d 85, 249 N.E.2d 925 (1969); Richter Concrete Corp. v. Reading, 166 Ohio St. 279, 142 N.E.2d 525 (1957). In making street improvements a municipal assessment procedure is limited by state statutes under power conferred upon the state by OHIO CONST. art. XIII, § 6; State *ex rel.* Osbourne v. Williams, 111 Ohio St. 400, 145 N.E. 542 (1924); Berry v. Columbus, 104 Ohio St. 607, 136 N.E. 824 (1922); Youngstown v. Mitchell, 30 Ohio Op. 122 (C.P. 1943).

[186] Niles v. Dean, 25 Ohio St. 2d 284, 268 N.E.2d 275 (1971); Lindsay v. Cincinnati, 172 Ohio St. 137, 174 N.E.2d 96 (1961); Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617, *cert. denied*, 305 U.S. 621 (1938); Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929). Again, the regulations must be reasonable, *Niles v. Dean, supra*; Cincinnati Motor Transp. Ass'n v. Lincoln Heights, 25 Ohio St. 2d 203, 267 N.E.2d 797 (1971); Cincinnati v. Luckey, 153 Ohio St. 247, 91 N.E.2d 477 (1950); Ashtabula v. Kovacs, 8 Ohio App. 2d 320, 222 N.E.2d 440 (1965). Municipal regulatory control is affected by the state's exercise of its police power in OHIO REV. CODE ANN. § 723.01 (Page 1953) and predecessor sections in imposing a duty upon municipalities to keep their streets, "open, in repair, and free from nuisance." This duty in pre-Home Rule days gave rise to the power to regulate the use of municipal streets, Stiving v. Pioneer, 24 Ohio Dec. 333 (C.P. 1914), but this duty cannot now be conditioned, Wilson v. East Cleveland, 121 Ohio St. 253, 167 N.E. 892 (1929). It is not violated if a street purpose is permitted by a municipality which is not a nuisance and does not substantially interfere with traffic, United States Bung Mfg. Co. v. Cincinnati, 73 Ohio App. 80, 54 N.E.2d 432 (1943), but it is violated if an obstruction results, Gerspaker v. Cleveland, 21 Ohio Op. 537 (C.P. 1941). A municipality cannot convey an interest in the streets prejudicial to the rights of the public, Toledo & Ohio Cent. Ry. v. Hatford, 15 Ohio App. 305 (1921). Nor can a municipality charge a license fee for the ordinary non-commercial use of the streets, Wooster v. Evans, 92 Ohio St. 504, 112 N.E. 1082 (1915); Great Atlantic & Pacific Tea Co. v. Tippecanoe, 85 Ohio St. 120, 96 N.E. 1092 (1911).

[187] The municipal power to regulate a utility was confirmed and the limiting of motor buses to certain streets to prevent congestion was found reasonable at the same time that the court admonished against "interference" with PUC powers, Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925). Municipally designated location of stops for bus passenger service was sustained when no route was prescribed by the PUC, Eastern Ohio Transport Corp. v. Bridgeport, 44 Ohio App. 433, 185 N.E. 891 (1932), *appeal dismissed*, 126 Ohio St. 238, 184 N.E. 852 (1933).

[188] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918) (conflicting rates); Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N.E. 694 (1925) (municipal barring of intercity PUC approved motor bus transport); Cleveland v. Public Util. Comm'n, 130 Ohio St. 503, 200 N.E. 765 (1936), (PUC setting intercity bus routes without municipal consent). The

sion which ended protracted litigation involving the municipal power to force a utility found to have no franchise to discontinue service and remove its poles from the city's streets without first seeking PUC approval as required by statute.[189] Of more direct significance to this point, a lower court in another recent case[190] followed the "no conflict" approach rather than the local self-government one to find invalid a city ordinance compelling a telephone company to place its wires underground in an urban renewal area. Telephone companies, unlike electric utilities, have been

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above cases, those in notes 186 and 187 *supra*, represent a retreat from the broad local self-government language of Billings v. Cleveland Ry., 92 Ohio St. 478, 111 N.E. 155 (1915), *supra* note 183, and Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919), *supra* note 185, as the concurring opinion in Lorain Street R.R. v. Pub. Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925), and the dissenting opinion in *Nelsonville v. Ramsey*, *supra*, indicate. They are less of a departure from Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923), *supra* note 183, in that, even though they involved a statutory grant, municipal power was sustained, with the possible exception of *Nelsonville v. Ramsey*, *supra*, on a constitutional basis and municipal regulation was overturned only when it was of an obstructive nature and in conflict with state regulations, matters expressly reserved in the *Perrysburg* case. Although Home Rule power to operate a public utility or to contract for such services, conferred by provisions of OHIO CONST. art. XVIII, § 4 is not subject to a "no conflict" limitation, it has been subjected to municipal regulation when exercised in a neighboring municipality in *Cleveland Ry. v. North Olmsted*, *supra*, and in effect curtailed by statute in Local Tel. Co. v. Cranberry Mutual Tel. Co., 102 Ohio St. 524, 133 N.E. 527 (1921), on the rationale of a state regulation of a utility.

189 State *ex rel.* Klapp v. Dayton Power & Light Co., 10 Ohio St. 2d 14, 225 N.E.2d 230 (1967), OHIO REV. CODE ANN. §§ 4905.20-.21, *as amended*, (Page Supp. 1970). Home Rule power under OHIO CONST. art. XVIII, § 3, did not become an issue until a state court of appeals treated the case for the second time, 11 Ohio App. 2d 64, 228 N.E. 2d 673 (1962). This court noted that the extraterritorial effects of an ouster of a company supplying intercity services, observed in State *ex rel.* Wear v. Cincinnati & Lake Erie R.R., 128 Ohio St. 95, 190 N.E. 224 (1934), were not in issue in the *Dayton Power & Light* case nor was a company's voluntary abandonment of service. It concluded, however, that the city's efforts at ouster was an exercise of the police power which failed since it was in conflict with the state regulation of the "mode of its exercise." *Id.* at 72. It was this conclusion of conflict between the uses of the police power which was affirmed by the supreme court, 10 Ohio St. 2d 14, 225 N.E.2d 230 (1967). The suit had first been filed as a *quo warranto* proceeding in 1933 and had been removed to the federal courts on diversity grounds, 170 F. Supp. 722 (S.D. Ohio 1957), *aff'd*, 263 F.2d 909 (6th Cir. 1959), but was reversed 359 U.S. 552 (1959) on the ground that removal had been improper. The main thrust of these lower federal court decisions and the initial basis of the Ohio court of appeals decision, 113 Ohio App. 433, 178 N.E.2d 838 (1960), on first reconsidering the question, was that the state's statutory procedure for ouster was not an impairment of a franchise existing at the time of the passage of the statute. Rather, it was found that there was no valid franchise, since when granted prior to 1886, the city had no power to make a grant to a power company in view of the decision in Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 113 N.E. 402 (1916) *aff'd*, 251 U.S. 173 (1919). The court of appeals also considered the issue of curtailment of municipal contract power for utility services under OHIO CONST. art. XVIII, § 4, as a result of this statutory procedure. It found no deprivation on the authority of *State ex rel. Wear v. Cincinatti & Lake Erie R.R.*, *supra*, which in turn had cited with approval the previous dismissal, East Ohio Gas Co. v. Cleveland, 121 Ohio St. 628, 172 N.E. 379 (1930), of an appeal from a court of appeals decision, 34 Ohio App. 97, 170 N.E. 586 (1929), which had reached the same result. This latter decision concluded that the overturning of a franchise provision for abandonment of service because of a prior conflicting statutory procedure did not lessen the municipal constitutional power to contract but only provided for orderly discontinuance of service by requiring that the consent of the state PUC be obtained first.

190 Cincinnati & Suburban Bell Tel. Co. v. Cincinnati, 7 Ohio Misc. 159, 215 N.E.2d 631 (P. Ct. 1964).

granted the right by statute[191] to use municipal streets without the consent of the municipality, subject to arbitration by the probate court as to the mode of construction.[192] It was with this provision that the court found the municipal ordinance in conflict.[193]

In light of this Home Rule approach to the source of municipal power over public utilities, municipal dependency upon the state legislature is reduced to the extent to which a denial or modification of power is consistent with Home Rule theory and to the degree to which it might be said that circumstances have made obsolete those decisions which have placed authority within Home Rule. These possibilities will be considered in the next three sections.

VI. To What Extent Does State Regulation of Utilities Serve As A Limit on Municipal Regulation?

This question, although not directly considered by the court in *Painesville*, is one that might well be raised, as it was by counsel for CEI,[194] in view of the scope of state regulation of the electric utility industry. Considering the problem within the confines of Home Rule theory as developed by Ohio courts, the exercise of the state's regulatory power over utilities does not itself serve to preclude municipal regulation except insofar as a "conflict" between the sets of regulations results.[195] That conflict must be "head-on;" that is, the municipal charter or ordinance must either permit what the state forbids or vice versa.[196]

The extensive nature of the state regulations on a particular subject should not change this basic approach.[197] Therefore, even though in

[191] OHIO REV. CODE ANN. § 4933.16 (Page 1953).

[192] OHIO REV. CODE ANN. §§ 4931.01, .11 (Page 1953), .08 (Page Supp. 1970).

[193] Although the city could not compel underground construction of telephone lines, neither could the company undertake it, nor could the court order it, without the consent of the city in light of OHIO REV. CODE ANN. § 4931.20 (Page 1953), which provides for underground construction "when the consent of such municipal corporation has been obtained."

[194] Brief for Appellee at 13, 24, Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

[195] OHIO CONST. art. XVIII, § 3.

[196] Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923). The "conflict by implication" variation as applied primarily in the liquor field, Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944), bears some resemblance to preemption. Yet there is a basic difference. The conflict theory rests on state regulation of individuals from which a specific affirmative permission is implied, while preemption, as will be seen, is a broader denial of power to a lower level of government implied from a higher level's entrance into a particular field of regulation. The court in Cleveland v. Raffa, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968), clearly refused to equate the two.

[197] It, or a state license requirement, does, however, place additional strain on the theory as evidenced by the frequency in which some more comprehensive displacement of municipal power is suggested, *e.g.*, Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955); Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964); Lyndhurst v. Compola, 112 Ohio App. 483, 169 N.E.2d 558 (1960); Williams v. Jackson, 82 Ohio L. Abs. 177, 164 N.E.2d 195 (C.P. 1959); Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946); Canton v. Imperial Bowling Lanes, Inc., 7 Ohio Misc. 292, 220 N.E.2d 151 (Canton Mun. Ct. 1966).

Painesville the state Public Utilities Commission had under statutory authority[198] adopted comprehensive national safety standards of construction for the electrical industry,[199] both levels of government would still have police power, and a municipal regulation would be invalid only if it contradicted a valid use of the state's power. The doctrine of preemption, whereby the higher level of government is said by its own regulations to deny impliedly an area of regulation from a lower level of government, has not been the development of Ohio municipal law.[200]

But this does not mean that expressions and even holdings of preemption do not appear in Ohio. It would be strange if they did not. The doctrine is fully applicable to the actions of the federal government both in its relations to the states as well as to municipal corporations.[201] Since the state's relationship to counties is on a different basis from that to municipal corporations, preemption may well be applicable against a county's regulatory efforts.[202] Even with respect to municipal corporations, the state's power over taxation, resting on specific constitutional provisions,[203] has long been held to include a preemption approach.[204] In addition, mention of preemption might be inadvertent as an outgrowth of these accepted uses or because the doctrine is not uncommon in other states even as applied to the generality of municipal-state problems.[205] It might be used unnecessarily and certainly misleadingly in fields in which the state is held to have exclusive power.[206] But in the broad range of state-municipal exercise of police power, the doctrine of preemption—the judicial determination of legislative intent to deny municipal power through the mere exercise of the state's own regulatory power—has no place. This has been made evident in lower and supreme court decisions dating from early Home Rule times to the most recent days.[207] The state cannot deny

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198 OHIO REV. CODE ANN. §§ 4905.06, 4963.40, 4963.41 (Page 1953).

199 Administrative Order No. 72 and Session Order No. 285, as amended, (1966), incorporating "Safety Rules for Electric Supply and Communication Lines," Part 2 of National Electric Safety Code (6th ed.), National Bureau of Standards Handbook H-81.

200 Vaubel, *Municipal Corporations and the Police Power in Ohio*, 29 OHIO ST. L.J. 29, 46-50 (1968). Express statutory denial is more properly reserved for treatment in the next section of this article.

201 Greater Fremont, Inc. v. Fremont, 302 F. Supp. 652 (N.D. Ohio 1968), *aff'd on other grounds sub nom.*; Wonderland Ventures v. Sandusky, 423 F.2d 548 (6th Cir. 1970); Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 919 (1945).

202 Security Sewage Equip. Co. v. Beebe, 5 Ohio Misc. 178, 214 N.E.2d 853 (C.P. 1965).

203 OHIO CONST. art. XIII, § 6, art. XVIII, § 13.

204 State *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919).

205 1 C. ANTIEAU, LOCAL GOVERNMENT LAW, § 3.06, at 109-111 (1968).

206 In cases involving the management and operation of courts: *In re* Parks, 45 Ohio L. Abs. 379, 67 N.E.2d 459 (Ct. App.), *appeal dismissed*, 146 Ohio St. 694, 61 N.E.2d 713 (1946); Myers v. Defiance, 67 Ohio App. 159, 36 N.E.2d 162 (1940); Underwood v. Isham, 61 Ohio App. 129, 22 N.E.2d 468, *appeal dismissed*, 135 Ohio St. 320, 20 N.E.2d 719 (1939).

207 Cleveland v. Raffa, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968) (liquor); Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939) (liquor); Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962) (crime and traf-

and the courts cannot imply a denial of power granted by the constitution.[208]

Despite the clarity of this reasoning and the repeated use made of it, reference to preemption is made in apparent contradiction even more often at all judicial levels. Although it would be unnecessarily strained to conclude that none of these decisions is in fact contradictory of the broad statement that the state cannot preempt a regulatory field, still, most of the decisions can readily be distinguished on one of several grounds. The clearest are those which, as noted, did not deal with police power matters but with those subjects to which the use of preemption is well established.[209] In most of the cases where this was not true the reference to preemption was little more than a reference.[210] Thus, no clear definition

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fic); Stary v. Brooklyn, 51 Ohio Op. 378, 114 N.E.2d 633 (C.P. 1953), *aff'd*, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955) (housetrailer); Dayton v. Stearns, 26 Ohio Misc. 115 (Dayton Mun. Ct. 1971); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918) (dictum) (crime).

208 "[L]ocal police . . . regulations . . . are subject to no limitations of the General Assembly, except that such ordinances shall not be 'in conflict with the general laws' . . . . [w]hile pre-emption by implication has been held to exist in the area of state and local taxation . . . [t]hese factors, however, are not relevant here." Cleveland v. Raffa, 13 Ohio St. 2d 112, 113-15, 235 N.E.2d 138, 140-41 (1968); "[I]f there were a statute creating the same offense, it could not be exclusive, even if the general assembly of Ohio in express terms prohibited the municipality from legislating upon the same subject-matter. . . ." Greenburg v. Cleveland, 98 Ohio St. 282, 286, 120 N.E. 829, 830 (1918); "The Legislature cannot deprive a municipality of that constitutional power, directly or indirectly. The validity of a local police regulation therefore depends not on any question of a state prohibition or pre-emption of the municipal constitutional power, but rather upon existence of a 'conflict.' . . . ." Columbus v. Glascock, 117 Ohio App. 63, 64, 189 N.E.2d 889, 890, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962).

209 *See* sources cited *supra* notes 201-02, 204, 206. At times the courts have assumed the validity of express or implied preemption in the regulatory area when concerned with the validity of a municipal measure as a tax. These assumptions were not necessary for the decisions and may have been influenced by the presence of the tax issue. Globe Security & Loan Co. v. Carrel, 106 Ohio St. 43, 138 N.E. 364 (1922), *aff'g sub nom.* Welfare Loan Co. v. Carrel, 32 Ohio Ct. App. 65 (1921) (statutory); Richmond Heights v. LoConti, 19 Ohio App. 2d 100, 250 N.E.2d 84 (1969).

210 The cases deal with crime, the regulation of liquor, house-trailers and various other subjects. Most groups would seem to be refuted directly by the holdings of the cases cited in note 207 *supra* and the others by implication: Cassidy v. Ohio Pub. Service Co., 78 Ohio App. 221, 69 N.E.2d 649 (1946), *appeal dismissed*, 149 Ohio St. 580, 79 N.E.2d 912 (1948) (utilities); Photos v. Toledo, 19 Ohio Misc. 147, 250 N.E.2d 916 (C.P. 1969) (crime); Williams v. Jackson, 82 Ohio L. Abs. 177, 164 N.E.2d 195 (C.P. 1959) (liquor); Epoch Producing Corp. v. Davis, 19 Ohio N.P. (n.s.) 465 (C.P. 1917) (motion pictures). Cases in which no preemption was found: Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955) (housetrailers); Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617, *cert. denied*, 305 U.S. 621 (1938) (motor vehicles); Wilson v. Zanesville, 130 Ohio St. 286, 199 N.E. 181 (1935), *overruled on other grounds*, 141 Ohio St. 535, 49 N.E.2d 412 (1943) (hours); Conrad v. Lengel, 110 Ohio St. 532, 144 N.E. 278 (1924) (peddlers, statutory preemption); Akron v. Williams, 113 Ohio App. 293, 177 N.E.2d 802 (1960), *appeal dismissed*, 172 Ohio St. 287, 175 N.E.2d 174 (1964), *rev'g a finding of preemption in* 84 Ohio L. Abs. 499, 172 N.E.2d 28 (Akron Mun. Ct. 1960) (crime); State *ex rel.* Wynne v. Urban, 91 Ohio App. 514, 107 N.E.2d 637 (1953) (civil service); Davis v. McPherson, 72 Ohio L. Abs. 232, 132 N.E.2d 626 (Ct. App.), *appeal dismissed*, 164 Ohio St. 375, 130 N.E.2d 794 (1955) (housetrailers); Columbus Legal Amusement Ass'n v. Columbus, 50 Ohio L. Abs. 353, 79 N.E.2d 915 (Ct. App. 1947) (amusement devices).

of what was meant by preemption was given. It seems generally as if the term has been used interchangeably with "conflict"[211] in the traditional police regulation sense.[212] In a few cases the courts seem to have placed greater reliance on preemption.[213] But even these decisions cannot be considered as firm precedent because they were not divorced from the conflict approach and each can be said to have been contradicted[214] or pointedly avoided[215] by Supreme Court of Ohio holdings involving similar facts. Negative preemption—the state's removal of itself from or refusal to enter a field serving to imply a limit on municipalities' power to enter—although applied in the tax field,[216] was rejected in an appeals court case involving utility regulation.[217] The court assumed that a statute prohibiting a city from requiring the insulation of electrical wires would be valid, but it refused to consider repeal of a statute requiring insulation as amounting to such a preclusion.[218]

The most serious impetus to the adoption of a preemption approach to the state's use of police power can be discerned when either of two fact patterns exist or, more particularly, when they coincide. The mention of preemption has been more common when matters of health were in issue[219] or when the courts have suggested that a matter of "statewide" rather than "local" concern was involved[220] or when both were present.[221]

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211 OHIO CONST. art. XVIII, § 3.

212 Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

213 Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964) (statutory preemption, housetrailer); Lyndhurst v. Compola, 112 Ohio App. 483, 169 N.E.2d 558 (1960) (liquor); Canton v. Imperial Bowling Lanes, Inc., 7 Ohio Misc. 292, 220 N.E.2d 151 (Canton Mun. Ct. 1966) (liquor).

214 Cleveland v. Raffa, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968) (liquor).

215 Anderson v. Brown, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968) (housetrailer). The court carefully rested its decision on the ground of "conflict" between municipal and state licensing requirements and not on the express preclusion of municipal licenses contained in OHIO REV. CODE ANN. § 3733.07 (Page Supp. 1970).

216 Haefner v. Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946).

217 Cassidy v. Ohio Pub. Service Co., 78 Ohio App. 221, 69 N.E.2d 649 (1946), *appeal dismissed*, 149 Ohio St. 580, 79 N.E.2d 912 (1948).

218 Nor was the establishment of the state Public Utilities Commission thought to be an implied affirmative limit on a municipality's power to regulate its streets. Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617, *cert. denied*, 305 U.S. 621 (1938).

219 Davis v. McPherson, 72 Ohio L. Abs. 232, 132 N.E.2d 626 (Ct. App.), *appeal dismissed*, 164 Ohio St. 375, 130 N.E.2d 794 (1955) (involving house-trailers, but no preemption was found).

220 State *ex rel.* Helsel v. Bd. of Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (C.P. 1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948). Attempts to apply the preemption theory were rejected in lower court decisions, impliedly, by acceptance of a "no conflict" approach, Heath v. Licking County Regional Airport Authority, 16 Ohio Misc. 69, 237 N.E.2d 173 (C.P. 1967), and expressly in Stary v. Brooklyn, 51 Ohio Op. 378, 114 N.E.2d 633 (C.P. 1953), but simply found not to be present in the affirming decision, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955). In *Painesville*, although a "matter of statewide concern" was found, no mention was made of preemption.

221 Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946), but with an alternative basis for decision.

It is with respect to a statewide matter, though, that the only well-developed theory of preemption involving the use of police power has been articulated.[222] But this articulation was by only a single judge[223] and his theory has not gained express acceptance.[224]

Where cases have reached beyond the mere mentioning of preemption to suggest a more comprehensive state power in health and "statewide" matters, those cases were rather more clearly involved with identifying a retention of state authority in face of claims of curtailment by municipal Home Rule grants[225] than they were with establishing either exclusive state power or a theory by which the state could achieve exclusiveness. Consequently, it is difficult to say that preemption has become sufficiently formulated, even with respect to those matters with which it most frequently appears, to serve as a theory to strike down the municipal regulation in *Painesville*.

In the present discussion, the relatively recent supreme court case of *State ex rel. McElroy v. Akron*,[226] remains the most troublesome. It would seem from the thrust of the court's opinion that a state fee placed on the operation of watercraft on state waters, including those waters owned by a municipality, is a tax, which on basic tax theory preempts similar municipal taxes from the field.[227] But the court deeply concerned itself with police regulation considerations in a carefully noted "statewide concern" context. In fact, the syllabus of the case is phrased in police regulation and preemption terms[228] and a statute expressly prohibits further municipal licensing of watercraft.[229] Still, it is difficult to believe that this case sets a point of new departure for preemption. The issue was not clear-

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222 State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) (Williams, J., concurring). It was proposed that in matters of local self-government a municipality was supreme, in the use of police power on local matters, the municipality could not conflict with state law, but that in the use of police power in a matter of "statewide concern" a municipality could be required by the state to act or it could voluntarily act until the state preempted the field.

223 *Id.*

224 This is to say, no clear establishment of a separate preemption approach to statewide matters, as distinguished from more frequent use of the term, is disclosed in Ohio case law.

225 State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940) (health and statewide); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929) (health and statewide); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931) (health and statewide). However, it is somewhat less clearly reflected in Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946) (health and statewide); Smith v. Mayfield Heights, 48 Ohio Op. 443, 108 N.E.2d 861 (C.P. 1952) (statewide).

226 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed*, 371 U.S. 35 (1962).

227 State *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919).

228 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed*, 371 U.S. 35 (1962), *commented on* Dayton v. Stearns, 26 Ohio Misc. 115 (Dayton Mun. Ct. 1971). A lower court, in considering the position of the municipal corporation, accepted in dictum this broader language despite finding a state-county conflict on a health problem. Security Sewage Equip. Co. v. Beebe, 5 Ohio Misc. 178, 214 N.E.2d 853 (C.P. 1965).

229 OHIO REV. CODE ANN. § 1547.61 (Page Supp. 1970).

cut considering the prominence given to the tax question. Moreover, the court presented no analysis of preemption as a distinct theory nor did it suggest the boundaries of the area to which it might be applied. Intertwined as well was the express statutory denial of municipal regulation, the validity of which the court clearly refused to consider in a more recent decision.[230] But since this aspect of the case raises an independent, though related problem, it is better treated separately as a consideration that goes to the heart of the *Painesville* case.

VII. Is an "Exclusion" of Municipal Power a "General Law" Within the Meaning of Home Rule Provisions?

A. *General Laws*

1. Judicial Development

The supreme court's early adoption of the "head-on" collision[231] approach as the basic interpretation of the "no conflict" provision of the municipal Home Rule grant and its relatively steadfast adherence to this approach through the years has represented a fundamental friendliness to Home Rule.[232] No doubt, the approach stemmed from early enthusiasm shown both on and off the bench for municipal autonomy at the time of the adoption of the Home Rule amendments and in succeeding years.[233] This enthusiasm was evidenced by the desire not only to free municipalities from addressing the General Assembly of the state as their source of power, but also to free them as much as possible from state supervision or restriction in the exercise of power.[234] As previously noted,[235] concern was expressed on the court in early Home Rule decisions over giving a broad scope to the concept of local self-government,[236] soon found available to all municipalities,[237] in order that exclusive municipal power might be established in a wide area of activities. Although response to the need

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230 Anderson v. Brown, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968). Similar statutory provisions are involved in several cases as previously indicated.

231 Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

232 Note, *Validity of Municipal Ordinances Prescribing Penalties Greater than State Laws*, 20 U. CIN. L. REV. 400, 406 (1951). The court has also found conflict by implication, that is, an implication of permission is derived from a prohibition, which is to be distinguished from the broader and therefore more significant implied preemption of a regulatory field, Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944), and conflict between a statutory felony and an ordinance creating a misdemeanor, Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1958).

233 Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919); Billings v. Cleveland Ry., 92 Ohio St. 478, 111 N.E. 155 (1915); Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

234 Fitzgerald v. Cleveland, 88 Ohio St. 338, 348, 103 N.E. 512, 515 (1913).

235 *See* note 183 *supra.*

236 Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919); Billings v. Cleveland Ry., 92 Ohio St. 478, 111 N.E. 155 (1915).

237 Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923).

for state regulation was forthcoming through the development of the police regulation aspect of Home Rule[238] and accompanying "no conflict" restraint, it was treated as a clear defeat by the uncompromising Home Rule enthusiast.[239]

It is no wonder then that preemption did not gain a foothold as the preferred doctrine, for it is premised on the power to deny or to restrict and is, therefore, essentially a negation of Home Rule. The power to deny can be exercised either expressly or impliedly. In dealing with preemption in the previous section, major emphasis was placed on implied denial. If the power to deny impliedly is rejected, can express denial be sustained? Express denial, at least, greatly lessens the courts' difficult task of discovering an oftentimes nebulous legislative intent. But if the basic power to deny is rejected it should make no real difference whether it is attempted expressly or impliedly. It is to this conclusion that the courts have come through an interpretation of what is meant by the "general laws" with which a municipality may not constitutionally conflict.

From the earliest cases,[240] even though at times in dictum,[241] the Supreme Court of Ohio has formulated a clear and simple definition of a "general law." It is a law enacted by the General Assembly[242] or promulgated under its authority[243] having uniform application throughout the state,[244] which evidences the state's concern for its citizens by providing them with rules of conduct.[245] It is not an exercise of the state's constitutional power to provide for the governance of municipal corporations,[246] absent charter,[247] for it is not one which purports to grant, limit,[248] or deny

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238 Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918).

239 *Id.* at 387, 121 N.E. at 709 (Wanamaker J., dissenting).

240 Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

241 Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918); Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917).

242 But not all so enacted, despite the failure to qualify the statement in the syllabus that a law passed by the General Assembly is a "general law," State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944). *See also*, Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio*, 32 U. CIN. L. REV. 92 (1963). However, common law principles do not qualify, Leis v. Cleveland Ry., 101 Ohio St. 162, 128 N.E. 73 (1920).

243 Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944).

244 Leis v. Cleveland Ry., 101 Ohio St. 162, 128 N.E. 73 (1920).

245 Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

246 West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

247 Substantive rules, Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964), or procedural rules, Morris v. Roseman, 162 Ohio St. 447, 123 N.E.2d 419 (1954).

248 The words "general laws" as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.
West Jefferson v. Robinson, 1 Ohio St. 2d 113, syllabus para. 3, 205 N.E.2d 382 (1965).

municipal power.[249] A general law is simply the state's exercise of its police power upon its citizens without reference to any of its subdivisions.[250]

The mosaic pattern of the application of these principles through the years does not present a completely accurate reflection either of this definition or of the concern underlying it.[251] This is no doubt due to a combination of causes. The supreme court has not often spoken directly to the issue; pre-Home Rule statutes expressed in municipal power terms still abound;[252] the legislature is prone to speak authoritatively when dealing with municipal corporations,[253] regardless of whether it is setting rules of government[254] or of police; and lower courts are naturally reluctant to look behind explicit legislative pronouncements. Moreover, the Home Rule concept and the enthusiasm for it waxes and wanes oftentimes in inverse relationship to the pressing nature of the need for legislative action. Even so, the several supreme court pronouncements do go a long way in directly settling the law in a number of areas and in setting straight previously divergent lower court views or even at times devitalizing subsequent ones.

Statutes directly denying municipal authority have been disapproved,[255] as have those which purport to grant authority to municipalities with express limits[256] or exceptions[257] or are claimed to imply limits.[258] Statutes

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249 Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918); Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917).

250 Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

251 *See generally* Vaubel, *Municipal Corporations and the Police Power in Ohio*, 29 OHIO ST. L.J. 29, 62-81 (1968).

252 The Municipal Code of 1902, 96 OHIO LAWS 20 (1902), now found in OHIO REV. CODE ANN. Title 7, and particularly Chapter 715, still awaits comprehensive revision.

253 *E.g.*, OHIO REV. CODE ANN. §§ 1547.61 (Page Supp. 1970), 3733.07 (Page 1971).

254 *E.g.*, OHIO REV. CODE ANN. § 143.27 (Page 1969).

255 "Local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution . . . . The term 'local authorities,' as used herein, means all officers, boards, and committees of counties, cities, villages or townships." OHIO GEN. CODE § 6307, *repealed*, 121 OHIO LAWS 682, 684 § 2 (1945). Stated not to be a general law, Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917) (dictum).

256 "[Any municipal corporation may] . . . make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months." OHIO GEN. CODE § 3628 now OHIO REV. CODE ANN. § 715.67 (Page 1953). Stated not to be a general law, Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929) (dictum), in agreement; Lorain v. Petralia, 8 Ohio L. Abs. 159 (Lorain Mun. Ct. 1929) (as to charter cities); Marko v. Youngstown, 6 Ohio L. Abs. 477 (Ct. App. 1928), *followed*, Mathews v. Russell, 87 Ohio App. 443, 95 N.E.2d 696 (1949); *In re* Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949); Kistler v. Warren, 58 Ohio App. 531, 16 N.E.2d 948 (1937); *and* Ermekeil v. State, 8 Ohio L. Abs. 121 (Ct. App. 1930), *rev'g* Brannon v. Wilmington, 31 Ohio App. 307, 165 N.E. 311, *appeal dismissed*, 119 Ohio St. 652, 166 N.E. 199 (1928), and refuting the assumption of validity in Magris v. Canton, 22 Ohio N.P. (n.s.) 312 (C.P. 1919), and, *In re* Sherlock, 19 Ohio N.P. (n.s.) 302 (C.P. 1916).

> Punishment of breaches of peace. Such punishment may be by imposing and collecting fines, or by imprisonment in the proper jail or workhouse at hard labor, or both, at the discretion of the court, but no person shall be fined for a single offense

which merely prohibit conflicting municipal regulations are susceptible to a constitutionally sound, "no-conflict" interpretation.[259] Statutes, even though directed at a municipality, have been held valid when their dom-

to exceed fifty dollars. Such imprisonment and hard labor shall not, for the first offense, exceed thirty days, for the second offense, ninety days, for the third offense six months, and for the fourth or any further repetition of the offense, one year.

OHIO GEN. CODE § 3665 now OHIO REV. CODE ANN. § 715.56 (Page 1953). Held not to be a general law, Leipsic v. Folk, 38 Ohio App. 177, 176 N.E. 95 (1931). *Contra,* Morris v. Conneaut, 20 Ohio N.P. (n.s.) 289 (C.P. 1917). Note, however, that a limit upon penalty to be imposed upon females contained in OHIO GEN. CODE § 2148-7, *repealed,* 120 OHIO LAWS 329, § 2 (1943), was construed in Lewis v. Columbus, 25 Ohio N.P. (n.s.) 213 (C.P. 1924), as a matter exclusively within legislative competence, under its authority over courts, State *ex rel.* Kudrick v. Meredith, 24 Ohio N.P. (n.s.) 120 (C.P. 1922), as ruled generally in State *ex rel.* Cherrington v. Hutsinpiller, 112 Ohio St. 468, 147 N.E. 647 (1925).

[257] Any municipal corporation may license . . . hawkers, peddlers . . . hucksters in the public streets . . . . No municipal corporation may require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, a license to vend or sell . . . any such article or product.

OHIO REV. CODE ANN. § 715.63 (Page 1953).

"Any municipal corporation may license transient dealers . . . . This section does not apply to persons selling by sample only, nor to any agricultural articles or products offered or exposed for sale by the producer." OHIO REV. CODE ANN. § 715.64 (Page 1953). Both §§ 715.63 and 715.64 were held not to be general laws in West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965). Prior lower court decisions treated these or predecessor sections as having a limiting effect upon municipal regulation of peddlers, Wooster v. Gentile, 116 Ohio App. 386, 188 N.E.2d 172 (1962); Frecker v. Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd,* 153 Ohio St. 14, 90 N.E.2d 851 (1950); North College Hill v. Woebkenberg, 59 Ohio App. 458, 18 N.E.2d 614 (1938); Nickles v. Echelberger, 21 Ohio L. Abs. 679, 31 N.E.2d 474 (Ct. App. 1935); Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C.P. 1949); Schul v. King, 35 Ohio Op. 238, 70 N.E.2d 378 (C.P. 1946); Frecker v. Zanesville, 35 Ohio Op. 234, 72 N.E.2d 477 (C.P. 1946); or assumed them to have such limiting effect, Ravenna v. Ivec, 95 Ohio L. Abs. 202, 202 N.E.2d 706 (Ct. App. 1963); Defiance v. Nagel, 108 Ohio App. 119, 159 N.E.2d 791 (1959); Mogadore v. Coe, 93 Ohio L. Abs. 449, 197 N.E.2d 570 (C.P. 1963); *See generally* Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio,* 32 U. CIN. L. REV. 92 (1963).

[258] OHIO GEN CODE § 6064-22 now OHIO REV. CODE ANN. § 4301.22 (Page Supp. 1970), Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939); OHIO REV. CODE ANN. § 715.55 (Page 1953), Akron v. Criner, 112 Ohio App. 191, 175 N.E.2d 746 (1960); OHIO GEN. CODE §§ 3657-76 (1938) now OHIO REV. CODE ANN. §§ 715.48-.64 (Page 1953, Supp. 1970), Columbus Legal Amusement Ass'n v. Columbus, 50 Ohio L. Abs. 353, 79 N.E.2d 915 (Ct. App. 1947). *Contra,* Central Outdoor Advertising Co. v. Evandale, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954).

[259] "The provisions of section twelve thousand six hundred and three shall not be diminished, restricted or prohibited by an ordinance, rule or regulation of a municipality or other public authority." OHIO GEN. CODE § 12608, *repealed,* 119 OHIO LAWS 766, 805 § 112 (1941). This section has been found not to be violated, Reed v. Hensel, 26 Ohio App. 79, 159 N.E. 843 (1927) as reenforcing conflict by implication, Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929), and Eshner v. Lakewood, 121 Ohio St. 106, 166 N.E. 904 (1929), and applied without analysis, F.D. Lawrence Elec. Co. v. Enterprise Lumber Co., 28 Ohio App. 30, 162 N.E. 434 (1924). Insofar as it limited municipal power it was thought not to have been a general law, Note, *The Stating of the Police Power of Ohio Municipalities to Enact Criminal Ordinances,* 14 W. RES. L. REV. 786 (1963). *Schneiderman v. Sesanstein, supra,* suggests the prohibitory language implies an affirmative right with which a municipality may not conflict, *see* textual discussion accompanying notes 312-19, *infra.*

Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive, of the Revised Code shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections.

OHIO REV. CODE ANN. § 4511.06 (Page 1953). This and a predecessor section were not

inant nature as regulations of the public has been recognized.[259] But there remain lower court as well as supreme court cases in which questionable laws of denial, limitation, and implied limitation have been assumed to be valid.[261] There are also holdings in which legislative authority to

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mentioned in two conflict cases, Toledo v. Best, 172 Ohio St. 371, 176 N.E.2d 520 (1961), *appeal dismissed*, 369 U.S. 657 (1962) and Toledo v. Ransom, 84 Ohio L. Abs. 12, 169 N.E.2d 657 (Toledo Mun. Ct. 1960), but have been applied on the basis of conflict, Dollar Savings & Trust Co. v. Youngstown, 19 Ohio App. 2d 225, 250 N.E.2d 883 (1969), liberally in favor of the ordinance, Cleveland v. Sado, 43 Ohio L. Abs. 183, 61 N.E.2d 910 (Ct. App.), *appeal dismissed*, 146 Ohio St. 126, 64 N.E.2d 322 (1945), and as providing constitutionally sound basis for preemption, Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962), but in Hiram v. Conner, 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960), as a statement of policy with which the municipal corporation could not conflict under the Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1958), rule. The *Hiram v. Conner*, *supra*, case also suggested that denial of authority in this context is a definition of a crime and therefore distinguishable from Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

> The public utilities commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor transportation company in this state . . . in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state, except as hereinafter otherwise provided. The commission, in the exercise of the jurisdiction conferred upon it by this chapter, shall have the power . . . to prescribe rules . . . notwithstanding the provisions of any ordinance . . . or permit enacted . . . or granted by any incorporated city or village . . . and in case of conflict between any such ordinance . . . or permit . . . the order, rule or regulation of the public utilities commission shall, in each instance prevail; provided that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this chapter . . . .

OHIO GEN. CODE § 614-86 now OHIO REV. CODE ANN. § 4921.04 (Page 1953). In Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925), the court sought to avoid conflict between municipal powers and those of the commission, but on the same day language suggesting that this statute was the source of municipal power over motor transport companies was used in Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N.E. 694 (1925). The provisions of 107 OHIO LAWS 69, 140 (1917), OHIO GEN. CODE § 7250, *repealed*, 110 OHIO LAWS 319, 322 (1923), "weights of loads . . . shall not be decreased or prohibited by any ordinance . . . of a municipal corporation . . . ." was not found determinative in the local self-government decision of Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919), a result apparently questioned by the court in the relatively recent case of Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961). Prohibition against contrary municipal regulation was found not to be violated since the ordinance did not entirely prohibit state permitted use in Patric v. New Carlisle, 31 Ohio Dec. 65 (C.P. 1919), OHIO GEN. CODE § 13421-12 now OHIO REV. CODE ANN. § 5589.08 (Page 1970). For a more full treatment of these conflict-type statutes, *See* Vaubel, *supra* note 251, at 70-75.

[260] Dayton v. Adams, 9 Ohio St. 2d 89, 223 N.E.2d 822 (1967); Englewood v. Bettis, 15 Ohio L. Abs. 8 (Ct. App.), *appeal dismissed*, 127 Ohio St. 504, 189 N.E. 4 (1933).

[261] Statutory bars against further municipal corporation license fees were not found to be directly applicable in the following cases: Conrad v. Lengel, 110 Ohio St. 532, 144 N.E. 278 (1924), OHIO GEN. CODE § 6351, *repealed*, 124 OHIO LAWS 53, § 1 (1951), construed not to prevent additional licenses; Globe Security & Loan Co. v. Carrel, 106 Ohio St. 43, 138 N.E. 364 (1922) *aff'g sub nom.* Welfare Loan Co. v. Carrel, 32 Ohio Ct. App. 65 (1921), OHIO GEN. CODE § 6346-2, *repealed*, 120 OHIO LAWS 75, 88 § 21 (1943), municipal tax. Limits on statutory authorized municipal speed limits for railroad cars contained in OHIO REV. CODE ANN. § 723.48 (Page 1953) and predecessor section, have been used as an indicator of what constitutes a reasonable municipal regulation in the following cases: Baltimore & O.R.R. v. DeLeone, 289 F. 201 (6th Cir. 1923); Cleveland, C.C. & St. L. Ry. v. Grambo, 103 Ohio St. 471, 134 N.E. 648 (1921); Bender v. New York Cent. R.R., 3 Ohio App. 2d 150, 209 N.E.2d 589 (1963); Banks v. Baltimore & O.R.R., 76 Ohio L. Abs. 83, 145 N.E.2d 350 (C.P. 1957), and provision in this statute for collection of a civil penalty was assumed in dictum to prevent

"withdraw" municipal power has been asserted. These can in general be distinguished, as indicated before,[262] on the ground that the court was not concerned with the precise nature of the power relationship between the state and municipalities[263] or because they deal with matters not encompassed within municipal Home Rule.[264]

2. Significance of the General Law Concept

With the development of judicial interpretation of the term "general laws," a sometimes faltering but still protective line has been drawn around municipal autonomy. This line has been drawn at a cost—a cost which can be characterized as Ohio "abhors a vacuum."[265] The state may not deny municipal power; it cannot exclude the municipality; and it cannot insure that an area will be free from regulation or further regulation. All it can do is regulate and thereby prevent a municipality from enacting "conflicting" or contradicting regulations. This is clearly a limitation, although just how serious a limitation is open to question.

After nearly 60 years of municipal Home Rule in Ohio a debate over the merits of each horn of the dilemma, municipal autonomy or a possible increase in the effectiveness of state authority, would appear academic. As has been seen, in that period of time the courts have determined what was intended by the writers of the Home Rule Amendments and how in judicial wisdom the intent may be adapted to the needs of the times. But of course this does not settle the matter, for discussion of the merits of legal interpretations is always appropriate in law as a means of bringing about change. Given the role of judicial review, it is entirely possible that the court might well shift its position in the interpretation of basic theory—a form of judicial legislation or, perhaps more accurately here, a form of constitution making. It is for this reason that the decision

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a municipality from imposing a criminal one, Toledo, C. & O. River R.R. v. Miller, 108 Ohio St. 388, 140 N.E. 617 (1923).

[262] *See* textual discussion accompanying note 225 *supra.*

[263] State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931); Smith v. Mayfield Heights, 48 Ohio Op. 443, 108 N.E.2d 861 (C.P. 1952).

[264] Niehaus v. State *ex rel.* Bd. of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924). The case may be considered as an interpretation of the state's exclusive power over education even though the court put considerable emphasis upon the state's authority in the police power area. A court's willingness in Columbus v. Kraner, 111 Ohio App. 484, 169 N.E.2d 44 (1960), to permit legislative limit of the municipal power to fix a statute of limitations, OHIO REV. CODE ANN. § 1905.33 (Page Supp. 1970) and now OHIO REV. CODE ANN. § 718.06 (Page Supp. 1970), has been ascribed to the exclusive power of the state over its courts and their procedures, Akron v. Smith, 14 Ohio St. 2d 247, 237 N.E.2d 396 (1968), which overturned the "no conflict" approach of Cincinnati v. Faig, 77 Ohio L. Abs. 449, 145 N.E.2d 563 (Cincinnati Mun. Ct. 1957).

[265] F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 374 (1970).

in *Painesville* takes on significance both for the legal scholar and the practitioner. Has the court shifted its position or is it about to do so? If it has or is going to shift its position, is the shift in response to a recognized or recognizable need or perhaps only in reaction to a limited problem?

B. *Painesville, a Departure?*

Argument of counsel for Cleveland Electric Illuminating, presented to the court in *Painesville*, followed traditional patterns. It was not claimed that the state could, in enacting § 4905.65 "forbid the exercise of local police power nor direct the manner of its exercise."[266] Rather it was claimed that the failure to have phrased the statute affirmatively, *i.e.*, that a public utility could construct transmission lines meeting certain standards, should not be fatal to its being held a "general law."[267] This position was countered by argument of counsel for the City of Painesville that § 4905.65 was a statute limiting municipal power and nothing more—"it does not authorize electric companies to do anything. . . ."[268]

Section 4905.65 is phrased in pertinent part:

> (B) To the extent permitted by existing law a local regulation may reasonably restrict the construction, location or use of a public utility facility, unless. . . . Nothing in this section prohibits a political subdivision from exercising any power which it may have to require, under reasonable regulations not inconsistent with this section, a permit for any construction or location of a public utility facility proposed by a public utility in such political subdivision.[269]

In addition, CEI contended, § 4905.65 "is a 'general' law because it amends and becomes a part of other statutes which are unquestionably 'general laws.' "[270] The City of Painesville turned the argument around. Singling out § 4933.16,[271] as a utility *regulation* and therefore a "general

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[266] Brief for Appellee at 21.

[267] *Id.* at 23.

[268] Brief for Appellant at 6. It was also suggested by counsel for Painesville that the state legislature can not make a determination of whether a municipal ordinance is reasonable without usurping the judicial function. Brief for Appellant at 8. Although such a determination cannot be conclusive, it would ordinarily be sustained since courts will defer to legislative judgment if there is a rational basis for it. A determination of this nature would raise a question of legislative definition of municipal power. Such a definition would place ultimate power in the legislature instead of the constitution. Specifically a determination of reasonableness as applicable to future ordinances would be an encroachment on municipal power to make such a judgment. Then too, in an area where there can be a difference of opinion and the legislative expression usually prevails, it might be difficult to say which legislative judgment, that the General Assembly or of the council, would be the more accurate, consequently, a curtailment of council's power to judge would likely result at times in an actual curtailment in its regulatory power. *Cf.* Vaubel, *supra* note 251, at 70 n.171.

[269] OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970).

[270] Brief for Appellee at 25.

[271] OHIO REV. CODE ANN. (Page 1953).

law," it reasoned that § 4905.65 does not modify the former statute since the latter is clearly a *power modification* provision.[272]

1. The Power to Exclude

a. Opinion of the Court

The supreme court in *Painesville* began its analysis by emphasizing the statewide significance of the problem presented in the facts and went on to conclude:

> [I]t is in the paramount interest of the state to provide general laws regulating the intrastate transmission of such current and to see that such transmission is *not impeded* by local regulation. Laws of general application are therefore essential.
>
> Section 4905.65, Revised Code, is such a law.[273]

It then phrased the effect of § 4905.65 as one which,

> [*p*]*laces* in each political subdivision control over matters which relate strictly to that subdivision but *removes from absolute local control* matters which relate to intrastate and intercity transmission of high voltage electricity.[274]

At still another point the court stated:

> In other words, section 4905.65, Revised Code, providing for the regulation of the construction of high voltage electric power lines by local subdivisions *excludes* from the control of such subdivisions intercity lines constructed with regard to the proper safety standards which do not unreasonably affect the welfare of the general public.[275]

Putting aside for the present the significance of the court's determination that it was dealing with a matter of statewide concern,[276] the court's language raises some doubt as to whether it was using "general laws" as it had earlier defined the term. It at least seems evident that the court was not analyzing § 4905.65 in terms previously used in determining the effect of a "general law."

First, it would not seem that this section "removes from absolute local control"[277] high voltage transmission matters since these matters could not be said to have ever been in *absolute* municipal control. Certainly, in light of the history of Home Rule such regulations would be within the police regulation rather than the local self-government portion of that constitutional grant of power.[278] As such, any exercise of municipal control

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[272] Brief for Appellant at 5-6.

[273] 15 Ohio St. 2d 125, 130, 239 N.E.2d 75, 78 (1968) (emphasis added).

[274] *Id.* (emphasis added).

[275] *Id.* at 131, 239 N.E.2d at 79 (emphasis added).

[276] *Id.* at 129, 239 N.E.2d at 78; *see* textual discussion accompanying notes 346-534, *infra.*

[277] *Id.* at 130, 239 N.E.2d at 78.

[278] State *ex rel.* Klapp v. Dayton Power & Light Co., 10 Ohio St. 2d 14, 225 N.E.2d 230 (1967); Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

would not be free from all outside supervision but would rather be subject to the limitation of "no conflict" with general laws.[279]

Next, should the court have meant that the statutory grant of such control was now being removed by § 4905.65, two objections might be raised. One, the municipality is not dependent upon statutory grant for its authority over utilities.[280] Two, if it were, it would not seem plausible to characterize such control as absolute when a municipality would then be dependent upon state largess for conferral of the authority and consequently would be subject to the state's limiting or removing it at any time.

Furthermore, was the court dealing with "general laws" in the traditional sense? It did not reiterate that a "general law" is one which prescribes rules of conduct for citizens and not just for municipal corporations. It did use the term "general law" in connection with the need to regulate the transmission of current,[281] but then immediately coupled that statement with one expressing the need to see to it that state regulations are not "impeded" by local ones.[282] As a consequence, the court's subsequent designation of § 4905.65, as a law of "general application"[283] is ambiguous since it cannot readily be determined whether the court was characterizing this section as regulatory of utilities or one directed at possible local government impediments.

Finally, the court's characterization of state authority raises further problems. It spoke of § 4905.65 as being an effort by the state legislature to "exclude" high voltage lines from local control.[284] This would suggest that the very "vacuum" regretfully thought that the state was incapable of creating[285] is now within its panoply of powers. In fact, as contended by counsel for Painesville,[286] that is the effect of § 4905.65. Its provisions do "exclude" a municipality from regulating while they exert no state compulsion against utilities to abide by any specific standards. This is not the effect of a "general law."[287] The court was forced to face misgiving at this point from one of its own members. The late Chief Justice Taft in a concurring opinion[288] expressed displeasure[289] over this portion of the court's opinion as not being consistent with the court's previous holdings,

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279 OHIO CONST. art. XVIII, § 3; Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

280 Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918).

281 15 Ohio St. 2d 125, 130, 239 N.E.2d 75, 78 (1968).

282 *Id.*

283 *Id.*

284 *Id.* at 131, 239 N.E.2d at 79.

285 *See* F. MICHELMAN & T. SANDALOW, *supra* note 265, at 374.

286 Brief for Appellant at 8-9.

287 West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

288 15 Ohio St. 2d 125, 132, 239 N.E.2d 75, 79 (1968).

289 *Id.* at 132-33, 239 N.E.2d at 80.

including that of *West Jefferson v. Robinson*,[290] in which the Chief Justice had recently and comprehensively treated the subject of "general laws."

b. Recent trend?

Before concluding that the court's opinion is inconsistent with precedent and therefore perhaps suggestive of a new approach, thought must be given both to a recurring style of legislative drafting and to judicial reaction to it. Although by no means new,[291] it would seem that the legislature is resorting more of late to provisions prohibiting municipal licensing.[292] In previously noted cases the courts have, when not crucial to the outcome and without discussion, assumed these earlier statutes to be valid.[293] In another instance an appellate court has interpreted statutory provisions in a way that avoided the creation of a conflict.[294]

More recently in *State ex rel. McElroy v. Akron*,[295] the supreme court, at least in the syllabus to the case, seems to have given its blessing to a statutory limit on the regulatory power of a municipality. This is at best a misleading result, since the court in its opinion could well be interpreted as concluding that a tax and not a regulation was really involved.[296] Moreover, if there were a regulatory basis for the decision it could have been intended to be limited to a situation in which a matter of "statewide concern" was found,[297] the significance of which will be discussed later.[298] An appellate court in *Noland v. Sharonville*,[299] partly in reliance upon *State ex rel. McElroy v. Akron*,[300] found such prohibitory language valid in a statute dealing with trailer regulation.[301] It made no reference to finding a matter of "statewide concern," although health considera-

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290 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

291 *E.g.*, 91 OHIO LAWS 370 (1894), OHIO GEN. CODE § 6351, *repealed*, 124 OHIO LAWS 53, § 1 (1951); 106 OHIO LAWS 281 (1915), OHIO GEN. CODE § 6346-2, *repealed*, 120 OHIO LAWS 75, 88, § 21 (1943).

292 *E.g.*, OHIO REV. CODE ANN. §§ 1547.61 (Page Supp. 1970), 3733.07 (Page 1971); also observed as a legislative tendency in Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 313 n.30, 326 (1960).

293 Conrad v. Lengel, 110 Ohio St. 532, 144 N.E. 278 (1924), OHIO GEN. CODE § 6351, *repealed*, 124 OHIO LAWS 53, § 1 (1951), construed not to prevent additional licenses; Globe Security & Loan Co. v. Carrel, 106 Ohio St. 43, 138 N.E. 364 (1922), *aff'g, sub. nom.* Welfare Loan Co. v. Carrel, 32 Ohio App. 65 (1921); OHIO GEN. CODE § 6346-2, *repealed*, 120 OHIO LAWS 75, 88 § 21 (1943), municipal tax.

294 Klein v. Cincinnati, 33 Ohio App. 137, 168 N.E. 549 (1929), 110 OHIO LAWS 221 (1923), OHIO GEN. CODE § 614-97, *repealed*, 120 OHIO LAWS 142 (1943).

295 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed*, 371 U.S. 35 (1962).

296 *Id.* at 195, 181 N.E.2d at 30.

297 *Id.* at 192-93, 194, 181 N.E.2d at 28-29.

298 *See* textual discussion accompanying note 489, *infra*.

299 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964).

300 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962).

301 OHIO REV. CODE ANN. § 3733.07 (Page Supp. 1971).

tions were involved.[302] Yet at the same time this court did not divorce itself from either the tax[303] or "no conflict"[304] approaches. The supreme court,[305] when presented with the same statutory provision, chose not to resolve the difficulty but rather to rest its decision on the traditional "head-on collision" approach[306] of conflict between two licensing requirements.[307] It is difficult to state that these developments of the recent past with respect to the "general law" concept formed a firm basis for the *Painesville* result, any more than it can be said that the *Painesville* decision has lent clarity to a situation which must be described as rapidly becoming confusing.[308]

2. Affirmative from a Negative

In regard to the contentions of counsel it will be recalled that no claim was made by CEI in favor of a state denial power.[309] Rather, it was asserted that § 4905.65 should be treated as if it affirmatively stated a utility's right to construct power lines meeting standards.[310] This interpretation would shift the statute from a measure ostensibly regulating municipal corporations, as claimed by Painesville,[311] to one regulating utilities and would therefore put it on a "general law" basis. At least two problems arise from this approach, one interpretive and the other substantive.

a. Interpretation

If § 4905.65 expressed in the negative with respect to municipal power, can be interpreted to have a positive meaning as to private rights, what is

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302 4 Ohio App. 2d 7, 10, 211 N.E.2d 90, 92 (1964).

303 *Id.* at 9, 211 N.E.2d at 92.

304 *Id.* at 8, 10, 211 N.E.2d at 91-92.

305 Anderson v. Brown, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968).

306 Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

307 Auxter v. Toledo, 173 Ohio St. 444, 183 N.E.2d 920 (1962).

308 An additional point of possible strength in the *Painesville* opinion is the fact that, although the court was faced with a statutory denial of municipal power, this was conditioned upon the finding of precisely defined circumstances:

> (B) To the extent permitted by existing law a local regulation may reasonably restrict . . . unless the public utility facility;
> (1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and
> (2) Is to be constructed in accordance with generally accepted safety standards; and
> (3) Does not unreasonably affect the welfare of the general public . . . .

OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970). It might be contended that the more detailed the statutory conditions to the denial of power the less discernible is the difference between a denial and a regulation of an individual, Vaubel, *supra* note 251, at 72 n.178. Yet, this really only goes to the attractiveness of the case, since the basic issue remains whether the statute is state preclusion or regulation.

309 Brief for Appellee at 21.

310 *Id.* at 23.

311 Brief for Appellant at 6.

to prevent similar statutes from being treated in the same manner? And if this interpretation is accepted, what happens to the distinction between "general laws" and those thought to regulate municipal corporations? What happens to the constitutional nature of the grant of police power to municipalities or to the significance of the relatively narrow interpretation given the constitutional term "no conflict"? Is the problem and its attendant constitutional theories reducible to one of expression? Unfortunately, as problems become more attenuated "nice distinctions" must be drawn in law. To turn a negative into a positive may appear to be a simple exercise in semantics but more than semantics is at stake.

A plea for such transformation is the very argument presented and accepted by the court in *Schneiderman v. Sesanstein*.[312] The relatively mild language of § 12608 of the General Code[313] was thought not to deny municipal power but to confer a positive right on motorists to travel at nonprohibited rates of speed.[314] However, this interpretation was offered by the *Schneiderman* court largely as a conclusion supporting one which was based on an expanded view of "no conflict."[315] The court found "conflict" to include "conflict by implication," *i.e.*, the statutory prohibition of conduct implies an affirmative permission to do that which is not prohibited.[316] This interpretation of legislative intent was then thought to be reinforced by the accompanying limitation on municipal action of § 12608, General Code. Although this approach expands the area of possible state-municipal conflict beyond that of the "head-on collision," a conflict between state and local regulations remains necessary before a municipal regulation will fail. A simple denial of power still will not suffice. However, the dangers to be discerned in an increased area of conflict are limited, since a finding of conflict by implication has not been widely applied,[317] and in fact the theory seems to be considered, somewhat surprisingly by the courts as part of the more restrictive "head-on collision" test.[318]

On the other hand § 4905.65 could not be regarded as supporting an implied permission derived from prohibitions directed at electric com-

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[312] 121 Ohio St. 80, 167 N.E. 158 (1929).

[313] "The provisions of section twelve thousand six hundred and three shall not be diminished, restricted or prohibited by an ordinance, rule or regulation of a municipality or other public authority." OHIO GEN. CODE § 12608, *repealed*, 119 OHIO LAWS 766, 805 § 112 (1941).

[314] Schneiderman v. Sesanstein, 121 Ohio St. 80, 90, 167 N.E. 158, 161 (1929).

[315] *Id.* at 86, 167 N.E. at 160.

[316] *Id.*, although it has been suggested, not a "necessary" implication, Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 328 n.65 (1960).

[317] Vaubel, *supra* note 251, at 54.

[318] *E.g.*, Cleveland v. Raffa, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968), the court at the same time refused to equate the related doctrine of preemption with that of "conflict by implication." *See also* Note, *Municipal Control of Liquor in Ohio*, 12 W. RES. L. REV. 377 (1961).

panies, since it is not linked to any prohibitions. Nor would it be appropriate to use this section to derive an implied permission to support what might be contended are statutory grants of rights, or express permissions contained in §§ 4931.01, 4933.13, 4933.14, and 4933.16 of the Revised Code. To treat § 4905.65 as an expansion of rights would transcend a supportive role by using it to tread the dangerous area of creating private rights through express restrictions on municipal power. The particular interpretive problem raised by a claimed expansion of a right limited by a municipal power of consent and arguably present in the interrelationship of § 4905.65 with other sections of the code, will be considered later.

Although muted by time, the decision in *Schneiderman* still remains a threat to municipal autonomy, despite the use of the relatively mild language of § 12608 of the General Code to support a "no conflict" conclusion, since it would probably be difficult to limit the effect of the decision to these circumstances.[319] This risk is apparent whether the denial of local power appears without a regulatory statute, in a statute separated from a regulatory one, or even in the same statute as the regulation.

Efforts to give effect to intended municipal autonomy and to give a natural meaning to the "no conflict" words themselves have led courts to an interpretation which prevents a state denial of municipal power. Safeguarding local autonomy and the logic that only the people can alter a constitutional grant have led to a judicial definition of "general laws" consistent with this "no denial" aspect of the "no conflict" concept. The consideration underlying both of these concepts would be destroyed if a denial power were found, whether in a shift in the meaning of "general laws" itself or in the distortion of the meaning of "no conflict."

b. Grant as a Regulation

An even more fundamental substantive problem demands consideration even though it too calls for making nice distinctions. Does an affirmative grant of permission amount to a "regulation" in the sense of a "general law" regulatory of private individuals?

It would seem that to be truly regulatory a measure should have a negative effect on the entity regulated. If permission is an implication

319 Fordham and Asher, *Home Rule in Theory and Practice*, 9 OHIO ST. L.J. 18, 54 (1948). *Cf.* Hiram v. Conner, 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960). Approval of OHIO GEN. CODE § 12608, *supra* note 313, as a statutory determination of the evident fact that local interests are not involved in traffic regulations which is linked with the general law provision of OHIO GEN. CODE § 12603 has been expressed but, at the same time, the expansion of "head-on collision" conflict by the addition of "conflict by implication" was disapproved. Hitchock, *Ohio Ordinances in Conflict with General Laws*, 16 U. CIN. L. REV. 1, 27-31 (1942). Yet, state superiority was admittedly attained, and the need to resort to either of these approaches was removed, by a simple change in the language of § 12603. 113 OHIO LAWS 283 (1929), OHIO GEN. CODE (1938). This section has since been replaced by OHIO REV. CODE ANN. § 4511.21 (Page Supp. 1970).

from a municipal power denial statute it should fail as a "general law" for the reasons just proposed. If a measure is expressly permissive where no permission was needed (that is, an individual could have acted anyway), it is difficult to consider it as a regulation. Moreover, if considered a regulation, the measure would look suspiciously like an affirmative denial of municipal power. If a measure is permissive where permission is needed (that is, it removes in part an otherwise existing prohibition or lack of power) it can readily be considered regulatory. In that case to exceed the permission is to risk a penalty[320] or a determination of a lack of power.[321] Therein is a negative effect. It is here that the courts apply that portion of the "head-on collision" test, which defines a state-local conflict as a municipality forbidding what the state "permits."

What are the consequences of a utility constructing a transmission line within a municipality without meeting the standards stated in § 4905.65? As a result of that statute—nothing. No transgression is identified, no penalty is provided. Taken alone then, a statute such as § 4905.65 would seem to present more than a mere problem of negatives and affirmatives but one reaching the very nature of a regulation. Restrictive action would result only if there were other state statutes or regulations which would be violated or if the municipalities chose to exercise the power left to them by § 4905.65 and in some way penalized substandard construction or unreasonable threats to their inhabitants. But municipality-imposed penalties, dependent as they are on the individual judgments of legislative bodies on a level of government different from the General Assembly, could hardly make § 4905.65 a regulation within the meaning of "general laws." On the other hand, companion state statutory regulations might well change the result, which leads to the next argument presented by counsel for CEI.

3. A "General Law" because it modifies "General Laws"

The second prong of CEI's argument is more persuasive than the first. It, too, attempts to stay within the traditional interpretation of "general laws" and makes no claim for a state denial power. It is a simple suggestion that § 4905.65 is a "general law" because it modifies and fits into a pattern of "general laws."[322] After all, § 4905.65 cannot be considered in isolation. It has already been related to the needs of the industry and of the community when the reasonableness of municipal regulation was

320 *E.g.*, OHIO REV. CODE ANN. §§ 4301.58 (Page 1965), 4301.99 (Page Supp. 1970); OHIO REV. CODE ANN. §§ 4507.02, 4507.99 (Page Supp. 1970).

321 7 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 3413, 3417, 3459 (1964), at least, in the case of contracts of private corporations, where fully executory on both sides; Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 113 N.E. 402 (1916).

322 Brief for Appellee at 25. This assertion of relationship even though denied by Painesville, Brief for Appellant at 5-6, lays to rest a contrary speculation in Vaubel, *supra* note 251, at 72 n.178.

examined.[323] Now it is appropriately considered in relationship with previous legislative enactments and the present state regulatory scheme.

Prior to 1886 a municipality did not have the power to grant to an electric company the right to use its streets.[324] In that year the state, the reservoir of all power at that time, granted this authority to municipalities in the form of a statute which permitted electric companies the use of such streets provided they first obtained the consent of the municipality.[325] Later, electric companies were tied to the statutory provisions of telegraph companies,[326] whose right to use municipal streets was thought to flow directly from the state[327] because a municipality did not possess the power to deny use but could only have the manner of its exercise resolved in a probate court.[328] However, after nearly 10 years the earlier municipal consent power to electric companies without intervention of the probate court was reestablished.[329] This state of affairs now exists in current statutes.[330]

The significant question is the nature of these statutes and therefore the

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323 *See* textual discussion accompanying note 155 *supra.*

324 Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 438, 113 N.E. 402, 404 (1916), *aff'd*, 251 U.S. 173 (1919).

325 *Id.*; 83 OHIO LAWS 143 (1886) now OHIO REV. CODE ANN. § 4933.13 (Page 1953).

326 84 OHIO LAWS 7 (1887) now OHIO REV. CODE ANN. §§ 4933.14, .16 (Page 1953).

327 Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 439, 113 N.E. 402, 405 (1916), *aff'd*, 251 U.S. 173 (1919); Cincinnati & Suburban Bell Tel. Co. v. Cincinnati, 7 Ohio Misc. 159, 215 N.E.2d 631 (P. Ct. 1964), in which it was held that telegraph company provisions, OHIO REV. CODE ANN. § 4931.01 (Page 1953), applied to telephone companies OHIO REV. CODE ANN. § 4931.11 (Page 1953) and was a general law with which a municipality could not conflict.

328 Zanesville v. Zanesville Tel. & Tel. Co., 64 Ohio St. 67, 80, 59 N.E. 781, 785 (1901).

329 92 OHIO LAWS 204 (1896) now OHIO REV. CODE ANN. § 4933.16 (Page 1953).

330 "A telegraph company . . . may construct telegraph lines upon and along any of the public roads . . . within this state, by the erection of the necessary fixtures. . . . Such lines shall be constructed so as not to incommode the public in the use of the roads or highways . . . ." OHIO REV. CODE ANN. § 4931.01 (Page 1953).

> Except section 4931.08 of the Revised Code, [involving probate court settlement of disputes] sections 4931.01 to 4931.23, inclusive, and 4933.13 to 4933.16, inclusive, of the Revised Code, apply to companies organized for supplying public and private buildings . . . with electric light and power. . . . Except as provided by section 4931.08 of the Revised Code, every such company shall have the powers and be subject to the restrictions prescribed for telegraph companies by sections 4931.01 to 4931.23, inclusive, of the Revised Code.

OHIO REV. CODE ANN. § 4933.14 (Page 1953).

> A company organized for supplying electricity for power purposes, and for lighting the streets . . . may manufacture, [and] sell . . . electric light and power required in such municipal corporation. . . . With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines . . . through the streets. . . .

OHIO REV. CODE ANN. § 4933.13 (Page 1953).

> No person or company shall place . . . a line, [or] wire . . . to conduct electricity for lighting . . . through a street . . . without the consent of such municipal corporation. . . . The penalty provided by section 4933.99 of the Revised Code for violation of this section [a fine of not less than one hundred nor more than five hundred dollars] is cumulative to other means of enforcing this section open to the municipal corporation. . . .

OHIO REV. CODE ANN. § 4933.16 (Page 1953).

nature of the modifying provisions of § 4905.65. Do they create a state conferred right in electric companies limited by municipal consent provisions or do they confer power upon municipalities to grant rights to those companies?[331] Over 50 years ago the supreme court seemed to accept the latter approach when it found that electric companies possessed less power than telegraph companies and that the legislative intent to vest a municipality with the power to make grants to the electric companies seemed clear.[332] Moreover, this approach received support in dictum as recently as 1953:

> [M]unicipalities have exclusive control over the rights and privileges of electric, gas and water companies.
>
> . . . .
>
> Municipalities not only have complete control in granting franchises to electric, gas and water companies but have the power to regulate the rates charged by such companies.[333]

If this conclusion is accepted, then § 4905.65 in modifying this statutory picture, does not modify "general laws" as claimed, but rather modifies power statutes and is thus itself a power denial statute and not a "general law." On the other hand, if in light of Home Rule the obsoleteness of the municipal-power-granting aspect of these electric company statutes is emphasized, if the history of a creation-of-rights dimension to these statutes is not forgotten, and if the regulatory features of § 4933.16 of the Revised Code[334] are not overlooked, a modifying statute, such as § 4905.65 could then be reasonably termed a "regulatory law" because it would be amending private rights or regulatory measures and as a regulatory law it would be a "general law." Nor, in following this approach, would the negative expression of § 4905.65 prevent giving it a right-expanding meaning. It would not be necessary to jeopardize the "general law" concept by broadly interpreting a negation or restraint of municipal power as creating a private right, nor even by tolerantly considering such

331 Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 439, 113 N.E. 402, 405 (1916), *aff'd*, 251 U.S. 173 (1919).

332 *Id.* at 441, 113 N.E. at 405. The phrase which helped reinforce the court's opinion, "In order to subject such companies to municipal control alone," was omitted in the 1953 codification of OHIO REV. CODE ANN. § 4933.16 (Page 1953).

333 Cambridge v. Public Util. Comm'n, 159 Ohio St. 88, 96-97, 111 N.E.2d 1, 6 (1933). At the same time the court in stressing municipal statutory power made no mention of any Home Rule grant. The court in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971), held that OHIO REV. CODE ANN. § 4933.13 (Page 1953), confers a franchise right on electric utilities with municipal consent. *Id.* at 8. It also held municipal regulatory authority as to intercity transmission lines to be statutory and not part of Home Rule. *Id.* at 10.

334 The penalty provision, *supra* note 330, was especially noted by counsel for Painesville. Brief for Appellant at 5-6. The municipal power aspect of the predecessor of this section was emphasized in Hardin-Wyandot Lighting Co. v. Upper Sandusky, 93 Ohio St. 428, 113 N.E. 402 (1916), *aff'd*, 251 U.S. 173 (1919), *see* textual discussion accompanying note 331 *supra*. *See also* note 332 *supra*.

provisions as impliedly expanding an existing private right. Rather, because it deals with a right limited by a municipal consent power, § 4905.65 could, as contended by CEI,[335] be accepted on the narrow ground that in its curtailment of municipal power it is expanding the right of public utilities by the not unnatural method of reducing the limit placed upon it.

As will be recalled, it is with respect to the interrelationship of these early statutes with the provisions of § 4905.65 that counsel for Painesville presented a directly contradictory argument to that just offered.[336] Rather than dispute that these early statutes dealing with electric companies and municipal consent power are "general laws," Painesville conceded this point. In fact, § 4933.16 was singled out because of its prohibitory provisions as clearly being a state police regulation. But this fact instead of suggesting, as it did to CEI, that § 4905.65 by modifying these "general laws" was therefore also a "general law," serves to stress, according to Painesville, the dissimilarity between these early statutes and the power annulling provisions of § 4905.65 and forces the conclusion that this latter section was not meant to be a modification of these earlier statutes. As an independent statute, then, § 4905.65 would fail to qualify as a "general law."

On the other hand, support for a "right-expansion" approach to § 4905.65 is not limited to the argument of CEI's counsel. Chief Justice Taft criticized the court in its conclusions with respect to "general laws" and the power of the state "to exclude" municipal power while still concurring in the judgment of the court. The Chief Justice first noted the broad grant of right[337] made applicable to electric companies,[338] the municipal consent statute, § 4933.16 as a "proviso" thereto, and the statutory power of utilities to condemn land.[339] He then expressed his agreement with that portion of the court's opinion in which § 4905.65 was treated as an amendment to § 4933.16.[340] Thus it would seem that Chief Justice Taft was adopting the argument that an affirmative statutory right in the utilities had been created and that § 4905.65 properly constitutes an expansion of this grant by restricting the limitation on it. Accepting § 4905.65 as a modification of earlier statutes as found by the Court and urged by Chief Justice Taft, then despite the weight to be accorded precedent that held these earlier statutes to be municipal power provisions, the closeness of the question between this interpretation and one which considers these provisions to be a conferral of a limited electric company right makes a cate-

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335 Brief for Appellee at 23.

336 Brief for Appellant at 5-6.

337 OHIO REV. CODE ANN. § 4931.01 (Page 1953), *supra* note 330.

338 OHIO REV. CODE ANN. § 4933.14 (Page 1953), *supra* note 330.

339 OHIO REV. CODE ANN. § 4933.15 (Page Supp. 1970).

340 15 Ohio St. 2d 125, 133, 239 N.E.2d 75, 80 (1968).

goric rejection of § 4905.65 as a regulatory law or a "general law" untenable.

There remains, however, a consideration raised earlier. Even if § 4905.65 is treated as a modification of a grant of right to utilities, is such a grant without expressed negative restrictions a "general law"? Despite the "niceness" of the question, taking the section alone, it might well not be a "general law." But § 4905.65 is not to be taken alone if it is considered as an expansion of a statutory right[341] into an area heretofore "off limits."[342] It then is regulatory. In addition, its provisions fit into a general regulatory scheme of the state providing comprehensive safety construction standards for electric utilities to abide by.[343] Consequently in this situation, a utility straying beyond the safety conditions set in a permissive statute would not be free from state imposed penalties.[344]

4. Significance of the decision

a. Summary

Even though some support for a conclusion that § 4905.65 is a "general law" on the particular facts of *Painesville* might be found on the basis of the argument presented by CEI and the one apparently adopted by Chief Justice Taft, this is not to say that this result is devoid of danger. A negative might with some misgivings be properly interpreted as an affirmative, given the peculiar history of the statute to which § 4905.65 is related. An affirmative grant can be treated as a regulation where restrictions for overstepping the permission are in fact present. Yet, where these qualifications are not made clear in a decision the case might well become precedent for a broader rule of general state denial power—one much more injurious to municipal autonomy. This is even more likely if the language used, as is true in the majority opinion of *Painesville*, is actually inconsistent with a "general laws" finding.

Painesville thus poses a distinct threat to municipal Home Rule because of its apparent departure from the principles which have been developed in relationship to the constitutional concept of "general laws." This is more a departure than a shift of position, because the court failed to present a basis for the abandonment of the old or the establishment of a new

341 OHIO REV. CODE ANN. §§ 4931.01, 4933.13, 4933.14 (Page 1953).

342 A municipal street can not be used by a public utility without authorization as a matter of right, Columbus v. Public Util. Comm'n, 103 Ohio St. 79, 133 N.E. 800 (1921), and an electric company is expressly prohibited from doing so by OHIO REV. CODE ANN. 4933.16 (Page 1953).

343 Administrative Order No. 72 and Session Order No. 285, as amended, (1966), issued under provisions of OHIO REV. CODE ANN. § 4963.40 (Page 1953), incorporating "Safety Rules for Electric Supply and Communication Lines," Part 2 of National Electric Safety Code (6th ed.), National Bureau of Standards Handbook H-81.

344 OHIO REV. CODE ANN. § 4963.41 (Page 1953).

position. Nor does it sketch, even in outline form, the dimensions of a new theory.

b. Limitation

The *Painesville* decision did not present only a "general laws" issue. Rather, the court relied heavily on its finding that a "matter of statewide concern" was involved.[345] In fact, it is upon this latter aspect of the case that the major emphasis of the future is likely to be placed. Whatever justification can ultimately be found for this decision will rest upon its development, if any, of the doctrine of "statewide concern."

What then does the presence of a state interest suggest? Is it indicative of a matter outside of municipal Home Rule over which the state has complete control and, if so, how is this to be determined with adequate safeguards to local autonomy? Or, if not, can "statewide concern" serve to denote a limited theory of increased state authority rather than a general power to deny municipal police power—an increase which, although likely inconsistent with the theory of "general laws," might arguably be justified by the state's need to meet broader and more complex problems in the modern setting, particularly, if the power were exercised with restraint as was done in § 4905.65?

If "statewide matter" is beyond municipal power, *Painesville* could be a threat to local autonomy only if its facts did not justify finding a state interest or if the concept of "statewide concern" itself has been developed too expansively. If a theory of enhanced state power is intended, *Painesville* need not be a complete reversal of previous concepts, nor need it necessarily stand for the demise of Home Rule, given adequately drawn limits. Rather, it could stand for a new accommodation of interests—for a sort of intermediate theory. But since the drawing of such limits is often no simple matter, much depends on whether *Painesville's* construction of a "statewide concern" framework does provide protective restraint against an overexpansion of state power. Consideration of the significance of this aspect of the *Painesville* decision necessitates an examination into the judicial use of the term. What is the scope of "statewide concern" and what are its merits within the structure of state-municipal relations in Ohio?

VIII. To What Extent Does the Concept "Statewide Concern" Serve as a Limit on Municipal Power?

With the adoption of Home Rule provisions in 1912, political power was divided into three segments between the state and municipal levels of government. First, exclusive state power remained in those areas where a

[345] A finding that apparently did not impress Chief Justice Taft, 15 Ohio St. 2d 125, 132, 239 N.E.2d 75, 79 (1968) (concurring opinion).

municipality was in no way affected or in which for various reasons state dominance seemed required.[346] Second, an area of exclusive municipal power[347] was created by the Home Rule amendments insofar as local self-government is exercisable[348] by charter municipalities[349] as well as in acquiring and operating public utilities or contracting for their services.[350] Third, an area of mutual power—the promulgating of police regulations —was established with points of friction in the enactments of the two levels subject to resolution by the "no conflict" test.[351] Given such a division there is no place for a fourth category. Yet, the courts have made frequent enough reference to matters of "statewide concern" to suggest that some modification in these divisions of authority have been judicially found or created, unless the term is used simply as another way of referring to an already existing division. Certainly, counsel for CEI strongly urged the importance of a "statewide concern" theory in *Painesville*[352] and the majority opinion of the supreme court emphasized its presence.[353]

A. *Statewide Concern—Judicial Development*

1. Historical View

Viewed from a historical standpoint, it can readily be observed that the principal initiating decision for a "statewide" concept was not rendered until 1929,[354] seventeen years after the adoption of Home Rule. Consequently, "statewide concern" is to be viewed as a part of the evolution of Home Rule rather than as an early close companion of it. A noticeable increase in judicial use of the term occurred in the 1940's and 1950's,[355] only to be followed by decisions undercutting not the theory itself but its applicability to specific subject matter.[356] Also, from the standpoint

346 State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929) (courts); State *ex rel.* Cherrington v. Hutsinpiller, 112 Ohio St. 468, 147 N.E. 647 (1925); Niehaus v. State *ex rel.* Bd. of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924) (education).

347 Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

348 OHIO CONST. art. XVIII, § 3.

349 State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960).

350 OHIO CONST. art. XVIII, § 4; Interurban Ry. & Terminal Co. v. Public Util. Comm'n, 98 Ohio St. 287, 120 N.E. 831 (1918).

351 OHIO CONST. art. XVIII, § 3; Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

352 Brief for Appellee at 25-33.

353 15 Ohio St. 2d at 129, 239 N.E.2d at 78.

354 Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929).

355 *E.g.*, State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944), *overruled*, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958); Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941); *overruled*, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958); Sullivan v. Civil Serv. Comm'n, 102 Ohio App. 269, 131 N.E.2d 611 (1956).

356 State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958); State *ex rel.* Lynch v. Cleveland, 164 Ohio St. 437, 132 N.E.2d 118 (1956), *noted in* 25 U. CIN. L. REV. 378 (1956) *and* 26 U. CIN. L. REV. 412, 415 (1957).

of time, a current shift of approach may be developing based in no small measure on *Painesville* itself.[357]

2. Nature of the Issue

The nature of the issue presented can be of importance to a court in reaching a finding of "statewide concern" and in assessing the significance of the determination. It is not uncommon for the term to appear when a question of state, as distinguished from municipal, power is raised; but its use in this context minimizes its effect on state-municipal relations. In state power cases reliance has frequently been placed on "statewide concern" in order to emphasize that the state has lost no sovereignty over the subject by the establishment of Home Rule,[358] that authority has not been vested in a municipality "exclusively,"[359] or that a municipality cannot "hamper,"[360] "throttle,"[361] or "stop,"[362] the state in the performance of its functions. With these conclusions there can be no argument. Home Rule is a grant of authority to municipalities and was not intended to be a curtailment of state power. The state must of necessity function and meet its general responsibilities to its citizens.[363]

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[357] *See also* State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962). On the other hand, the use of the term may simply be a confirmation of acknowledged state power. Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972).

[358] State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912); Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950); Hitchcock, *Ohio Ordinances in Conflict with General Laws*, 16 U. CIN. L. REV. 1, 49 (1942).

[359] Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972); State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912).

[360] State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946).

[361] Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923) (dissenting opinion).

[362] Lakewood v. Thormyer, 10 Ohio Op. 2d 61, 154 N.E.2d 777 (C.P. 1958), *aff'd*, 111 Ohio App. 403, 157 N.E.2d 431 (1959), *aff'd*, 171 Ohio St. 135, 168 N.E.2d (1960). Furthermore, a municipality cannot "interfere" with the state, State *ex rel.* Taylor v. French, 96 Ohio St. 172, 117 N.E. 173 (1917), not "exclude" the state, State *ex rel.* Helsel v. Bd. of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (C.P. 1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948), nor "encroach" on a state field of regulation, Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920).

[363] Silvey v. Commissioners, 273 F. 202 (S.D. Ohio 1921) (creating conservancy districts); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied*, 344 U.S. 865 (1952) (constructing highways); State *ex rel.* Automatic Registering Mach. Co. v. Green, 121 Ohio St. 301, 168 N.E. 131 (1929) (conducting state elections); State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929) (maintenance of courts); State *ex rel.* Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 134 N.E. 686 (1921); State *ex rel.* Taylor v. French, 96 Ohio St. 172, 117 N.E. 173 (1917) (conducting state elections); Miami County v. Dayton, 92 Ohio St. 215, 110 N.E. 726 (1915) (creating conservancy districts); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931) (creating health districts); Brook Park v. Cleveland, 26 Ohio Op. 536 (C.P. 1943), *appeal dismissed*, 143 Ohio St. 607,

The emergence of municipal autonomy was not meant to tear down state government. The only loss of authority by the state caused by Home Rule was to be in the area of its dealings with the municipalities themselves. Here the state can no longer supervise the actions of a charter municipality with regard to matters of local self-government[364] or in its acquisition or operation of a public utility;[365] nor can it deny municipal police power,[366] the state can only supersede municipal regulation by the exercise of its own power to the extent that municipal action is in conflict.[367] But this does not limit the state's exercise of police power.[368] In fact, in the leading "statewide concern" case[369] the court carefully noted that the only loss of state power in the police area was stated in Section 3 of article XVIII itself as occurring when the state failed to exercise its police power by use of general laws.[370] When the state does legislate this may suggest a greater measure of state control than the "no conflict" theory permits, but this statement certainly is sound in the stress it places upon the fact that the state's police power stands unimpaired by the Home Rule amendments. In the exercise of this retained state power, requirements that municipalities contribute to the success of the state project have been upheld.[371] But in these state power cases the use of "statewide concern" usually does not relate to municipal authority at all, even though courts have at times unnecessarily spoken of the "withdrawal" of municipal power.[372]

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56 N.E.2d 515 (1944) (resolving territorial divisions of local subdivisions); Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 31 (1948).

364 Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913); State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960).

365 Interurban Ry. & Terminal Co. v. Pub. Util. Comm'n, 98 Ohio St. 287, 120 N.E. 831 (1918).

366 West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

367 Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

368 State *ex rel.* Brainard v. McConnaughey, 137 Ohio St. 431, 30 N.E.2d 699 (1940).

369 Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929).

370 *Id.* at 427, 166 N.E. at 370.

371 Contributions can be required of a municipality for the support of a state created municipal health district, State *ex rel.* Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 134 N.E. 686 (1921); Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920); and for a state created local court, State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929). Requiring funds for a more efficient fire department was sustained in State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941), but questioned in State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), after the department was no longer considered of "statewide concern."

372 State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931). But "exclusive" state authority has been mentioned. Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E. 2d 594 (1950); Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920).

3. Exclusive State Power

One of the possible uses for "statewide concern" involves the intergovernmental power structure, that is, as a designation of matters which are exclusively the concern of the state and beyond municipal competency. There are decisions of this nature in which expansive language has been used,[373] including that of "statewide concern," when creating courts and providing for their procedure.[374] These decisions, in general, rest on specific constitutional grants of power to the legislature and pose no real threat to municipal autonomy. Another possible use for "statewide concern" involves the relationship between state and municipal power more directly. The term might be used to identify that area of the police power which is beyond municipal cognizance and within exclusive state authority. Certainly this use would be appropriate, given the fact that Home Rule is limited to "local" self-government and "local" police regulations.[375] It is in this manner that counsel for CEI urged the court apply the term.[376] However, there is little precedent for this approach. In one case[377] "statewide concern" was given an "exclusive state power" meaning to exclude a municipality from territory detachment matters, while in two other decisions exclusiveness was merely mentioned.[378]

Despite its theoretical soundness, an over-expansive finding of exclusive state police power can result in an undue restriction of municipal power over local interests. In one decision, where a finding of exclusive state power would have represented a shift of traditional authority away from the municipality,[379] a "statewide concern" concept was not fully

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373 OHIO CONST. art. II, § 36, *construed in* Miami County v. Dayton, 92 Ohio St. 215, 110 N.E. 726 (1915) (creation of a conservancy district), *accord*, Silvey v. Comm'rs, 273 F. 202 (S.D. Ohio 1921); OHIO CONST. art. I, § 7, art. VI, §§ 2, 3, *construed in* Niehaus v. State *ex rel.* Bd. of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924) (education in maintenance of schools); OHIO CONST. art. II, § 34, *construed in* Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943) (regulation of hours of business). *But see* Akron v. Klein, 171 Ohio St. 207, 168 N.E.2d 564 (1960). In earlier decisions musicipal power was found for the setting of hours for municipal workers on public works, Strange v. Cleveland, 94 Ohio St. 377, 114 N.E. 261 (1916), and assumed for municipal employees in general. State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941); Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950). An order transferring pension funds of municipal police and firemen to the state fund, OHIO REV. CODE ANN. § 742.26 (Page Supp. 1970), was sustained as an employee welfare measure under art. II, § 34 authority in State *ex rel.* Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967).

374 *E.g.*, State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929).

375 OHIO CONST. art. XVIII, § 3. *See* Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 33 (1948).

376 Brief for Appellee at 25.

377 Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

378 Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950) (civil service); Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920) (health). Both were essentially state power cases since no competing municipal regulation was involved.

379 Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), *overruled by*, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958). The dissent's willingness to permit a complete state takeover of a municipal function was not limited to a matter

developed and the court quickly retreated from the suggestion of exclusiveness in subsequent cases.[380]

4. Independent Theory within Police Power

Is the significance of a finding of "statewide concern" limited merely to the confirmation of areas as ones of exclusive state power and only at times suggestive of an outer limit to municipal police power? Or does the concept in effect establish a new and separate theory of state-municipal relations—one of expanded state power with a resulting curtailment rather than elimination of municipal power for certainly "statewide concern" does not suggest the expansion of municipal power into areas previously controlled by the state? If "statewide concern" does fill this more complex role it is most likely to be in that area of intergovernmental relations where each level possesses authority. This is the area of police power. But this is also the area to which the constitution provides the mediating test of "no conflict,"[381] a test reasonably firmly established in judicial interpretation.[382] There appears to be no good reason to resort to the different terminology of "statewide concern" to reach the same result of "no conflict" and even less reason to use "statewide concern" as a vehicle for overturning this result. To give an expanded state power meaning to "statewide concern" within the outer limits of local police power could only serve, then, to jeopardize the "no conflict" concept.[383] To give it a meaning of exclusive state power or of power to become exclusive, would constitute, as has been seen, a denial of a constitutional grant and consequently of the "general laws" concept which has been developed from it.[384]

a. Dividing Lines—Subject Matter

But the theory of "statewide concern" is not offered by the courts as a reordering of all state-municipal power interrelationships in the police power area, but only those which are of "statewide" importance. So limited, it might serve an intermediate role of meeting state interests more fully while preserving municipal interests as much as possible. Unfor-

of "statewide concern" so it does not abide by "preemption" or "general law" doctrines nor did it fit within the state's power to set rules of government for non-charter cities.

380 State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941) . These were all overruled as to statewide findings. State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

381 OHIO CONST. art. XVIII, § 3.

382 *See* text accompanying notes 30-35 *supra.*

383 Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962).

384 West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965). It would also suffer from the rigidity which marks a constitutional distribution of power, Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 307 (1960), and would by broad application take us back to pre-amendment days. *Id.* at 328 n.63.

tunately this approach creates difficulties of its own, because the establishment of a theoretical basis for differentiating between subjects of regulation is likely to be artificial.[385] Moreover, the practicalities of applying such an approach would be troublesome. It has already proved difficult for the courts to define what is a matter of "local" self-government[386] and, to some extent, what is an "exclusive" state area. To reinforce this assertion, reference need only be made to the problems which linger from finding street construction to be a matter of local self-government,[387] while finding education[388] and the creation of courts and courtroom procedure to be matters which exclusively concern the state.[389]

If "statewide concern" were to be given independent significance in the police power area, determining what subject is "state" and what is "local" would likely prove more difficult than even past delineations for the very reason that such a division is unrealistic. Few subjects are clearly all state or all local, even though as time passes more subjects may to an imprecise degree become more state than local. If state and local interests are in fact inseparable it would be sensible to permit both levels of government to regulate, while preserving a method of resolving points of friction which furthers this objective. That method should not weigh the scales too heavily in favor of the state as the superior level of government, particularly in light of the municipal powers provision of article XVIII, § 3, of the Ohio Constitution.[390]

b. Dividing Lines—Territorial Application

In determining the appropriate division of police power between state and local governments, rejection of the artificial distinction between mat-

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[385] *See* State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) (Williams, J., concurring). The division line within "police regulations" was said to be between misdemeanors and other police regulations. The former were under the "no conflict" limitation while the latter were matters of "statewide concern." It was thought that the effect of finding a matter to be of a "statewide concern" was to enable the state to preempt the field. And "necessity" provided the basis for municipal power in a "statewide" area in absence of the state's preemption.

[386] State *ex rel.* Lynch v. Cleveland, 164 Ohio St. 437, 439, 132 N.E.2d 118, 120 (1956). The court itself doubted that it had been more than "remotely" consistent in finding what was "local" which recalls the earlier misgivings as to the "hazy and ambiguous" nature of the constitutional terms. State *ex rel.* Cooper v. Toledo, 97 Ohio St. 86, 91, 119 N.E. 253, 254 (1917).

[387] Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961).

[388] State *ex rel.* Daley v. Parma, 68 Ohio L. Abs. 577, 123 N.E.2d 295 (Ct. App. 1952), where state authority to deny municipal power to operate a library was assumed to exist, perhaps on the basis of state power over education. Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 66-68 (1948). The supreme court later failed to find any state denial. State *ex rel.* Buescher v. Linton, 6 Ohio St. 2d 218, 217 N.E.2d 201 (1966).

[389] In Akron v. Smith, 14 Ohio St. 2d 247, 237 N.E.2d 396 (1968), state authority to provide a statute of limitations for violation of a municipal income tax ordinance was sustained under its authority over courts.

[390] *See* Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 65 (1948).

ters which exclusively concern one level of government or another would permit the acceptance of the more obvious and natural standard based on the area of a regulation's effectiveness—territorial application. Acceptance of this approach would have a double effect. It would remove "statewide concern" as an independent concept of state power intruding upon municipal police power and at the same time it would provide the means for drawing a constitutionally acceptable line between the outer limit of municipal police power and exclusive state power. Territorial application, and the "no conflict" test as to police regulations would be the only recognized limits on Home Rule power.

It has been argued that to apply only a territorial meaning to the constitutional phrase "local regulations" would be redundant because a municipal regulation could have no application other than within the territorial limits of the corporation;[391] and both a subject matter and a territorial application approach were mentioned with respect to local regulations in the first case in which an interpretation of the Home Rule amendments was required.[392] On the other hand, it has also been suggested that a subject matter approach to state regulation has been ruled out in the constitutional convention proceedings leading up to the adoption of these amendments[393] and in another early interpretative decision.[394] If the state regulatory power is to be given a territorial rather than a subject matter meaning, it would not seem unreasonable that the same approach be followed with respect to local regulation. A finding of redundancy could be avoided by resort to the not uncommon conclusion that the term "local" was simply used by the constitution writers as a form of emphasis. Moreover, support for full municipal power can be found in those decisions in which it has been held that municipal police power within its corporation limits is as complete as that of the state's within its limits.[395]

Territorial application, however, unless adhered to rigidly is not free from problems. "Local" regulations limited to the territory of the corporation have "extraterritorial effects."[396] Any advantage from adopting a territorial application approach is lost if intraterritorial regulation of a statewide subject matter is permitted, only to be overturned because of extraterritorial effects which flow from the very statewide scope of the subject matter being regulated. This close identity of the "effects" and

391 *Id.* at 26.

392 State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 97, 102 N.E. 670, 673 (1913).

393 Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 26 (1948).

394 Leis v. Cleveland Ry., 101 Ohio St. 162, 128 N.E. 73 (1920).

395 Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied*, 357 U.S. 904 (1958); Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918); 3 J. FARRELL, FARRELL-ELLIS OHIO MUNICIPAL CODE § 9.3 (11th ed. 1962).

396 Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923) (dissenting opinion).

"subject matter" approaches and the coincidence of results to be derived from their application makes differentiation between them difficult and fruitless. The courts have both emphasized the scope of a subject[397] and have sought answers to questions on whether a subject is "purely local"[398] or whether it "transcends borders"[399] or "concerns inhabitants outside"[400] the territorial limits of the municipality. It has even been said that a matter is of "statewide concern" if outsiders would be affected when they merely come within the municipality,[401] which argument if accepted makes local power little more than an illusion in our modern world.

The use, then, of either a subject matter or a territorial application approach, modified to take into consideration extraterritorial effects of the regulation, lends itself to the creation of a separate "statewide concern" concept. Each, in addition to being a constitutionally questionable curtailment of municipal power, suffers from practical problems of sizable proportions. Only strict adherence to the principle of comprehensive municipal police power within corporation boundaries subject only to the "no conflict" and "general laws" limitations would obviate these difficulties.

c. Fact or Fiction?

Two fundamental problems with respect to "statewide concern" as a designation for an independent concept of state authority remain unresolved. First, do the cases actually confirm its existence and second, if so, what purpose does it serve? Taking the second question first, the

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397 Those items which are used statewide, State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962); or prevade the state, Cincinnati & Suburban Bell Tel. Co. v. Cincinnati, 7 Ohio Misc. 159, 215 N.E.2d 631 (P. Ct. 1964).

398 State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State *ex rel.* Taylor v. French, 96 Ohio St. 172, 117 N.E. 173 (1917); Schultz v. Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950); Massa v. Cincinnati, 51 Ohio Op. 101, 110 N.E.2d 726 (C.P.), *appeal dismissed*, 160 Ohio St. 254, 115 N.E.2d 689 (1953).

399 Security Sewage Equip. Co. v. Beebe, 5 Ohio Misc. 178, 214 N.E.2d 853 (C.P. 1965).

400 State *ex rel.* Hackley v. Edmonds, 150 Ohio St. 203, 80 N.E.2d 769 (1948).

401 State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941); Smith v. Mayfield Heights, 48 Ohio Op. 443, 108 N.E.2d 861 (C.P. 1952). This approach was rejected by CEI in its brief to the court of appeals. Brief for Appellee at 58, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967). But just as a continuing enticement, sometimes of considerable strength, to finding increased state power arising from the nature of the subject matter or because of "outside effects" of a local regulation needs to be resisted to avoid a distortion of local autonomy, so does a similar attraction which seems to demand, at times, treating some police power matters as exclusively local. In Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972), the court was successful in resisting the claim that municipal zoning was an exclusive municipal power even though state zoning of municipal corporations would be a difficult, and fortunately unlikely, eventuality to accept. The case did not involve this stark possibility of the state itself zoning a municipality but rather the issue presented was whether the state had power to vest county commissioners as an "airport zoning board" with authority to act to safeguard an "airport hazard area" within a municipality but only when an airport was located in more than one political subdivision. OHIO REV. CODE ANN. §§ 4563.01 (Page Supp. 1970), 4563.03 (Page 1965).

most evident objectives sought to be accomplished by a finding of "statewide concern" have been to avoid accepting claims of municipal control and to establish state control. Not infrequently the issue of a case is framed by claims of superiority of municipal regulations over state regulations based on local self-government authority. When found unacceptable, these claims have to varying degrees influenced courts to overrespond through a "statewide concern" finding.[402] In other cases the courts have deliberately sought to establish a form of state control because it was considered "essential"[403] to the state, because it permitted the avoidance of local politics,[404] or, as is frequently mentioned, because it enabled the achievement of uniformity of regulation.[405] These reasons suggest the presence of a "statewide" concept and might be thought to be sufficiently important to justify embarking on a steeplechase of theoretical and practical hurdles to establish it. But the concept can be identified and these objectives achieved only if a finding of "statewide concern" is accompanied by a transformation of state power tailored to permit accomplishment of the objectives.

As has been observed, when problems of preemption and the nature of "general laws" were considered, a finding of "statewide concern" has given rise to a variance in judicial language from that usual to Home Rule,[406] although often not crucial or even important to the results reached. Unfortunately for purposes of clarity, this variance ranges from exclusive state power,[407] which as noted,[408] is infrequent and is not suggestive of special areas, to the most frequent "no conflict,"[409] which, of course,

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[402] *E.g.*, Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958) (not to be left to the "whims" of each municipality); Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), *overruled as to statewide finding,* State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958) (prevent possible complete municipal abolishment of police and fire departments); State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912) (a pre-Home Rule case) (avoid the folly of permitting a municipality to act entirely in its own self interest); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931) (avoid nonuniform regulation).

[403] State *ex rel.* Giovanello v. Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942).

[404] Smith v. Mayfield Heights, 48 Ohio Op. 443, 108 N.E.2d 861 (C.P. 1952).

[405] State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed,* 371 U.S. 35 (1962); Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958). 921 (1958).

[406] *See* text accompanying notes 213-29, 261-64 *supra.*

[407] Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950), and Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920). No municipal regulations were involved.

[408] *See* text accompanying notes 373-80 *supra.*

[409] State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State ex rel. O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941); State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941); Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941); Schultz v. Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950); Cleveland v. Mulloff, 28 Ohio L. Abs. 324 (Ct. App. 1938); Heath v. Licking County Regional Airport Authority, 16 Ohio Misc. 69, 237 N.E.2d 173 (C.P. 1967); Cincinnati & Suburban Bell Tel. Co. v. Cincinnati, 7 Ohio

amounts to no real variance at all. Between these interpretations of "statewide concern" are those which hold state authority to "supersede,"[410] "change,"[411] or even "confer" municipal power,[412] occasionally to "preempt" it[413] or prescribe the manner of its use,[414] and to impose duties upon municipalities to ensure that the functions involved are properly carried out.[415]

From this summary of results it is evident that municipal power is sometimes curtailed, but it is also evident that no discernible pattern emerges which provides a firm basis for the establishment of a special theory of enhanced state competence. It can be said, particularly when reflection is given to the other ways in which "statewide concern" is used, that the results of a finding of "statewide concern" are as multi-headed as the types of problems to which the term has been applied. To make it into a single concept is to distort its history. To seek its significance as a pliable approach to problems depends on a more detailed examination of the subjects to which it has been applied.

5. Subject Areas

a. Exclusive State Power

Findings of exclusive state jurisdiction have been made in a group of cases already noted,[416] which are based upon special constitutional grants

Misc. 159, 215 N.E.2d 631 (P. Ct. 1964); Stary v. Brooklyn, 51 Ohio Op. 378, 114 N.E.2d 633 (C.P. 1953), *aff'd*, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955); Campbell v. Hassay, 45 Ohio L. Abs. 391, 67 N.E.2d 695 (Ct. App. 1945) (dictum).

410 Sullivan v. Civil Serv. Comm'n, 102 Ohio App. 209, 131 N.E.2d 611 (1956).

411 Smith v. Mayfield Heights, 48 Ohio Op. 443, 108 N.E.2d 861 (C.P. 1952).

412 Hyde v. Lakewood, 2 Ohio St.2d 155, 207 N.E.2d 547 (1965) (dissenting opinion); Wright v. Lorain, 70 Ohio App. 337, 46 N.E.2d 325 (1942).

413 State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed*, 371 U.S. 35 (1962); State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) (concurring opinion); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946); Security Sewage Equip. Co. v. Beebe, 5 Ohio Misc. 178, 214 N.E.2d 853 (C.P. 1965); Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946); Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio*, 32 U. CIN. L. REV. 92, 107 (1963). This was rejected in Stary v. Brooklyn, 51 Ohio Op. 378, 114 N.E.2d 633 (C.P. 1953), *aff'd* 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955).

414 State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941). This was questioned in State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), where the "statewide" designation was removed. *See also* Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946) (with a state power thrust).

415 Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), *questioned in* State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), with removal of "statewide" designation; Hyde v. Lakewood, 2 Ohio St. 2d 155, 207 N.E.2d 547 (1965) (dissenting opinion); State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) (concurring opinion); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946).

416 *See* note 373 *supra.*

of power to the General Assembly. The use of "statewide concern"[417] in this context is sound, although hardly necessary.

b. State Highways and Bridges

Similarities with the cases discussed previously can be discerned in the area of state highway or bridge construction within a municipality, although in this area the curtailment of municipal power is more debatable. Despite a municipal interest in this area, the state through its agencies is performing a state function. What is being built is essentially a state structure and claims that a municipality can veto a project within its boundaries because of the power of local self-government[418] have been met with findings of "statewide concern." It would be natural for a court to compare this situation with the construction of a state house by the state, a project which is free from municipal control,[419] rather than with the construction of a city hall by a city, which has been treated as a matter within exclusive municipal control.[420] It would be natural for a court to conclude that municipal consent for state highway construction is not necessary and that the municipality cannot impede this state project, even though construction, maintenance, and repair of municipal streets is a matter of local self-government.[421] More than a local matter, and, in fact, more than a matter of state jurisdiction is involved. Rather, regulation of the state itself as it carries out its functions is at stake. This is really not too dissimilar from the distinctions to be drawn at the federal-state governmental levels involving reciprocal tax immunity[422] and the more cooperative interrelationships which result when each level uses its powers to regulate private individuals and companies.[423]

This is not to say that local interests are to be ignored; and indeed, a regularized procedure for their presentation ought to be provided.[424] But, on balance, the final word should remain in the state so that state actions which do not constitute an abuse of power—a test to which they still must conform—are not defeated. Moreover, not all local regulatory pow-

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417 *E.g.*, State *ex rel.* Ramsey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929).

418 Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied*, 344 U.S. 865 (1952); State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927).

419 State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927).

420 Mulcahy v. Akron, 27 Ohio App. 442, 161 N.E. 542 (1924). But this would also leave a "statewide" improvement constructed by a municipality, as implied by the court in State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927), subject to state supervision.

421 Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961); Massa v. Cincinnati, 51 Ohio Op. 101, 110 N.E.2d 726 (C.P.), *appeal dismissed*, 160 Ohio St. 254, 115 N.E.2d 689 (1953).

422 Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960).

423 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

424 Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

er is said to have been lost with respect to state highway construction,[425] even though local planning and zoning measures are inapplicable.[426] However, even if local interests are thought to be greater than these state facility cases recognize, this would merely serve to question the use of "statewide concern" in them and would not provide a basis for the courts to extend its use into areas where state interests are less clearly evident.

c. Annexation and Detachment

Another area of the "unusual," where the intermixture of state-municipal relations suggests state control, involves annexation and detachment procedures. These have been found to be properly imposed by the state[427] over initial claims of a violation of Home Rule powers.[428] In a leading case[429] the Supreme Court of Ohio found detachment to be of "statewide concern," "exclusively"[430] within state control, on the broad ground that a municipal measure covering such a matter would not be local because its effects would extend beyond its boundaries. Here there is need for uniformity of regulation.[431] The results of a measure should be examined and if they affect only the municipality the measure is within local self-government, but if they have extraterritorial effect, and thus are not entirely local, it is a matter for the General Assembly.[432]

The result reached in these cases should meet with no serious objections, given the nature of the subject matter,[433] but one should be hesitant to accept the full implications of their rationale. They suggest that any municipal measure which has effects outside the territorial limits of the municipality fails because it is within an exclusive state area. Applied strictly, or even literally, Home Rule of the past 60 years in Ohio is dead. The courts in these cases faced a problem which permitted the application of a much more tailored rationale. They were dealing with physical territory and the alteration of other units of government. To have treated

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425 Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960).

426 State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied*, 344 U.S. 865 (1952); State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927).

427 Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); Schultz v. Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950); Brook Park v. Cleveland, 26 Ohio Op. 536 (C.P. 1943), *appeal dismissed*, 143 Ohio St. 607, 56 N.E.2d 515 (1944).

428 Brook Park v. Cleveland, 26 Ohio Op. 536 (C.P. 1943), *appeal dismissed*, 143 Ohio St. 607, 56 N.E.2d 515 (1944).

429 Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

430 "No conflict" terminology was used in Schultz v. Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950).

431 Beachwood v. Bd. of Elections, 167 Ohio St. 369, syllabus para. 2, 148 N.E.2d 921 (1958).

432 *Id.* at 371, 148 N.E.2d at 923.

433 Abolishment of municipal identity through dissolution of a corporation or merger of two is a different matter. *See* N. LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 25-30, 32 (1962).

such a measure as being within Home Rule would have eliminated the territorial dimension of that concept[434] and, in putting other political subdivisions in the retention of their territory at the mercy of municipal corporations, such treatment would have interjected municipal corporations between the state and its subdivisions. In the case of annexation, a Home Rule finding would have had the further effect of permitting a municipality more than a franchise to regulate outside of its boundaries, which usually demands legislative grant for support.[435] Such a finding would have been permission to bring the outside territory into the municipality on its terms and to subject this territory to all municipal taxes, debts and regulations, even though accompanied by the conferral of citizenship rights. Although at least one state permits this type of territorial adjustment,[436] it need not be accepted in Ohio. Its rejection, however, should not be placed on an overly broad ground that would permit what amounts to the establishment of broad exclusive state power in the area of municipal competence—state encroachment into municipal regulation of its territory through the overturning of all internal municipal measures which have extraterritorial effects.

Moving on from those cases in which exclusive state jurisdiction and state power issues were evident,[437] consideration may now be given to those cases in which the extent of municipal police power or the independence of a "statewide concern" theory was more frequently involved.

d. Airports

The establishment and regulation of airports would not appear to be beyond municipal competence,[438] nor certainly that of the state. In a recent Supreme Court of Ohio case, claims of exclusive municipal power to

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434 OHIO CONST. art. XVIII, § 3, Prudential Co-Op. Realty Co. v. Youngstown, 118 Ohio St. 204, 160 N.E. 695 (1928), cited in *Beachwood*; Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 69 (1948).

435 Prudential Co-Op. Realty Co. v. Youngstown, 118 Ohio St. 204, 160 N.E. 695 (1928).

436 Texas *ex rel.* Pan American Production Co. v. Texas City, 157 Tex. 450, 303 S.W.2d 780 (1957).

437 Sharp lines of division between diverse interests appear in several cases making them brief studies in contrasts. In State *ex rel.* Rhodes v. Bd. of Elections, 12 Ohio St. 2d 4, 230 N.E.2d 347 (1967), an issue for initiative vote of municipal citizens could be placed upon the ballot if it were a matter over which the municipal legislative body would have competence, but a question calling for the President of the United States to withdraw troops from Vietnam was found not to come within this limitation. In State *ex rel.* Cist v. Cincinnati, 101 Ohio St. 354, 121 N.E. 595 (1920), operating municipal offices and conducting municipal proceedings according to daylight-savings time was found to be a matter of local self-government, but placing the entire city on such time must not conflict with state law. In State *ex rel.* Taylor v. French, 96 Ohio St. 172, 117 N.E. 173 (1917), municipal enfranchisement of women and qualifying them for public office were found to be issues within local self-government power, but qualifications to vote in state elections or for state created judicial offices was beyond municipal power.

438 Constitutional authority would appear ample and statutory authority exists in OHIO REV. CODE ANN. § 719.01(0) (Page Supp. 1970).

zone within the territorial limits of a municipal corporation, despite statutory authorization of an independent "airport zoning board" with authority to zone for an "airport hazard area" when an airport is located in more than one political subdivision, were denied on the ground that the state is not precluded from acting on a matter of "state concern" such as public safety near a modern airport. Although the court suggested, without being required to decide, that a municipal zoning regulation might be "nullified" by an airport zoning board, it does not appear that the court contemplated an exclusive state power nor is it clear that the court was considering a preemptive one.[439] Without either intent, a reference to "state concern" would clearly seem to have been unnecessary because a simple recognition of a state-retained police power and of the probable applicability of the "no conflict" approach would have sufficed.

Reference was made to "statewide concern" in two lower court cases. In one of these, the presence of state power was again in issue and was found to be unimpaired by municipal Home Rule. The state's authorization of the establishment of an airport was sustained despite a claim that the operation of airports was a municipal power which the state could not confer upon county authorities. The court also noted that the state had "assumed control over" aviation.[440] A second case raised essentially a police power problem and a "no conflict" approach to a solution was more evident. The court found that the extension of an airport by a state-approved airport authority was not subject to municipal zoning prohibitions because they would create a conflict with a state determination.[441]

The combined effect of these decisions is at most only suggestive of a curtailed municipal power and not of an independent theory of "statewide concern" with respect to airport matters.

e. Police and Fire Departments

Beginning in 1941 through a series of cases which reached into the late 1950's, various aspects of the operation of fire and police departments were held to be matters of "statewide concern." Internal management of these municipal departments, including the selection of personnel,[442]

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[439] Willoughby Hills v. Corrigan, 29 Ohio St.2d 39, 278 N.E.2d 658 (1972); OHIO REV. CODE ANN. § 4563.01 (Page Supp. 1970), § 4563.03(B) (Page 1965). Neither exclusive nor preemptive state power appears to have been contemplated by the legislature since it is also provided that in case of conflict between any airport zoning board regulation and another zoning regulation the one "best calculated to insure safety shall govern." OHIO REV. CODE ANN. § 4563.04 (Page 1965).

[440] State *ex rel.* Helsel v. Bd. of County Comm'rs, 37 Ohio Op. 58, 60, 79 N.E.2d 698, 702 (C.P.), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948). Local zoning ordinances were found inapplicable.

[441] Heath v. Licking County Regional Airport Authority, 16 Ohio Misc. 69, 237 N.E.2d 173 (C.P. 1967).

[442] State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941); Smith v. Mayfield Heights, 48 Ohio Op. 443, 108 N.E.2d 861 (C.P. 1952).

hours worked,[443] tenure held,[444] pensions received,[445] claims for pay[446] and the manner in which employment disputes would be resolved,[447] all fell within this designation even where the creation of a municipal office would have been required.[448] Government structure and the selection and retention of personnel questions would appear to be matters of local self-government, particularly in view of earlier decisions.[449] Yet the questions were not resolved in this manner.

This variance in result was caused in part by the court's reaction in one of the initial cases to what it feared would be the consequences of a finding of municipal dominance.[450] The case involved municipal efforts to replace state pension provisions for the personnel of fire and police departments by a locally devised system. The court sought to prevent this from happening in order to protect, as it said, the interests of the state in fire fighting and crime suppression which would be injured if some future municipal abolishment of the departments themselves would occur. As a consequence, it found the public's interest in fire and police protection transcended municipal borders. Subsequent decisions added little to this rationale.[451]

Even though this finding of "statewide concern" emphasized state power[452] and was reinforced to some extent by later lower court cases favorable to state control,[453] the courts when dealing with police-fire de-

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443 State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941); Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950).

444 State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State *ex rel.* Giovanello v. Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942).

445 Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941).

446 Wright v. Lorain, 70 Ohio App. 337, 46 N.E.2d 325 (1942).

447 State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); *In re* Fortune, 138 Ohio St. 385, 35 N.E.2d 442 (1941); Sullivan v. Civil Serv. Comm'n, 102 Ohio App. 269, 131 N.E.2d 611 (1956).

448 Sullivan v. Civil Serv. Comm'n, 102 Ohio App. 269, 131 N.E.2d 611 (1956).

449 State *ex rel.* Lentz v. Edwards, 90 Ohio St. 305, 107 N.E. 768 (1914); Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913); *accord*, State ex rel. Hackley v. Edmonds, 150 Ohio St. 203, 80 N.E.2d 769 (1948). *See also* State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941) (dissenting opinion); Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio*, 25 U. CIN. L. REV. 378, 380 (1956).

450 Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), companion case of State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941).

451 *See* notes 442-48 *supra.*

452 Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941) (the state could impose duties); State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941) (the state could prescribe the manner and method of carrying out functions).

453 In Sullivan v. Civil Serv. Comm'n, 102 Ohio App. 269, 131 N.E.2d 611 (1956), it was held that state law "supersedes" local control and a charter city must create a municipal office to conform to statute. In Smith v. Mayfield Heights, 48 Ohio Op. 443, 448, 108 N.E.2d 861, 867 (C.P. 1952), it was held that the legislature has the power to "decrease, change, regulate, or take back powers which it has already given to municipalities." Taylor v. Cleveland, 87 Ohio App. 132, 139, 93 N.E.2d 594, 598 (1950), suggests the proposition that state power is "exclusive."

partment cases rather quickly settled on what was essentially a "no conflict" rationale.[454] "Statewide concern" was reduced to a traditional police power approach, but in an area in which such a solution did not comfortably fit all the problems presented, that is, those which were primarily matters of local self-government. After an interval of stress[455] the court rejected "statewide concern" as an automatic designation for the police and fire departments and returned to a local self-government rationale where government structure and personnel selection and retention were involved, with "no conflict" apparently serving as the solution for personnel welfare problems.[456] This change of approach by the courts, although altering its application, did not itself destroy what little support these cases accorded "statewide concern"[457] as an independent theory.

f. Health

When the broad scope of Ohio municipal corporation decisions is viewed, the area of health stands out as the one most likely to support the conclusion that "statewide concern" is a separate viable approach to a group of state-municipal power problems. This, too, is no doubt in part

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[454] State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941); Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio*, 25 U. CIN. L. REV. 378 (1956). For a general review of these police-fire department cases up to 1948, *see* Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 31-34 (1948).

[455] State *ex rel.* Lynch v. Cleveland, 164 Ohio St. 437, 132 N.E.2d 118 (1956).

[456] State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), *noted in* 20 OHIO ST. L.J. 152 (1959). *See also* Blume, *Municipal Home Rule in Ohio: The New Look*, 11 CASE W. RES. L. REV. 538, 545-50 (1962). The court directly overruled state *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943), State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941), and those portions of the holdings dealing with "statewide concern" in State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944), and Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941). The theory of local self-government still accepts state superiority, however, in absence of a charter. Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964). Sustaining the statutory right to court review of a civil service commission dismissal in *In re* Fortune, 138 Ohio St. 385, 35 N.E.2d 442 (1941), was moved to its alternative ground of state control over courts in Cupps v. Toledo, 170 Ohio St. 144, 163 N.E.2d 384 (1959). The suggestion that state police power continued to be a factor in support of state dealings with police and firemen was carried a step further when a state order to pay the pension funds of these groups into the state fund, OHIO REV. CODE ANN. § 742.26 (Page Supp. 1970), was sustained as an exercise of the state constitutional authority, OHIO CONST. art. II, § 34, to regulate wages and hours and promote the general welfare of "all employees." State *ex rel.* Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund, 12 Ohio St. 2d 105, 233 N.E.2d 105 (1967).

[457] The application of the more expansive effects ascribed to "statewide concern" in several cases was questioned once that designation was overturned, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, syllabus para. 8, 151 N.E.2d 722 (1958), as to the state's authority to impose duties, Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), or prescribe the manner and method of carrying out functions, State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941). There also remains the conclusion that the state serves as the source of municipal power. Wright v. Lorain, 70 Ohio App. 337, 46 N.E.2d 325 (1942). In essentially a state power case, Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950), Home Rule was found not to be a deprivation of "exclusive" state power.

a consequence of the manner in which the issue of state authority was first raised and of the approach by which the state has chosen to exercise its regulatory power with respect to matters of health.

The first significant case[458] was decided while the constitutional convention which was to propose municipal Home Rule debated. Perhaps as a consequence, the court was apparently faced with some form of municipal power claims because it concluded that power over health had not been delegated exclusively to the municipality. Rather, the state retained its sovereign power through an agency of its creation to order a municipality to take steps to stop stream pollution, which after all was of concern to the entire state. A similar result was reached in a leading post-Home Rule case[459] which involved almost an identical fact situation. The court again stressed the undiminished power of the state over problems of health which have no respect for political boundaries. It added the suggestion that the condition of municipal power was no different from pre-Home Rule days. Even though municipalities needed no longer look to the state for conferral of power, they possessed power over health matters subject to state withdrawal at anytime.[460]

Between these two cases, in point of time, the court was faced with the claim[461] that municipalities need not contribute to the costs of newly formed municipal health districts as required by statute. Here it was noted that the state could enact general health laws and this included the power to require contributions from its political subdivisions to carry them out without running afoul of a Home Rule claim of diversion of municipal funds. When subsequently faced with the claim[462] that employees of these districts were municipal employees, an appeals court ruled that the districts were properly created by the state under its health power as separate agencies of the state subject to its control, even though there was a coincidence of boundaries between municipality and health district. Therefore, district employees were not amenable to municipal regulation. The court pointed out that matters of health were not of local concern.

Put in basic terms, these cases present issues dealing with the thrust of state power. They stand for the propositions that the state has undiminished police power over the matters of health, and that it can choose to ex-

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458 State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912).

459 Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); *accord*, State *ex rel.* Neal v. Williams, 120 Ohio St. 432, 166 N.E. 377 (1929).

460 Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 427-28, 166 N.E. 370 (1929).

461 State *ex rel.* Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 134 N.E. 686 (1921); Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920). During this period a Home Rule proponent, Chief Justice Marshall suggested in dictum that matters of health were of general concern which were "not to be affected by special local regulations." Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 79, 148 N.E. 577, 580 (1925) (concurring opinion).

462 Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931).

ercise this power by directives to municipal corporations or by delegation to independent local subdivisions of its own making. With none of these conclusions can Home Rule proponents seriously object.

Home Rule, as earlier suggested, was not meant to hamstring the state in its exercise of its own police power even when directed at municipal activities. Nor is it tenable to contend that the state cannot do by agent what it clearly can do directly, that is, regulate health matters. Still, there is an obvious danger to Home Rule involved in state creation of independent agencies[463] to exercise power "withdrawn from municipalities."[464] The difficulty arises, then, with the term "withdraw." Even if a state agency is created it should be empowered only to regulate citizens and thereby supersede conflicting municipal regulations, not to preclude the making of these regulations,[465] given the real and continuing interest of municipalities in matters of health.[466] There was no need to find or to suggest a withdrawal of municipal power in order to sustain a state power to meet state health objectives either through newly created agencies of the state or through municipal corporations themselves. Nor has this been the pattern with respect to other state regulatory agencies.[467] Yet, it is not surprising that a court might fail to observe this distinction and adopt withdrawal language, given the combination of the strong state power thrust of the issues presented, given fact patterns involving actions of state agencies created for a special purpose, and given the fact that where municipal agencies were replaced they had been created under statutory grants of authority to municipalities predating Home Rule.[468]

The pattern of later decisions suggests that these early cases have played a role in setting matters of health apart from other areas of police power regulation, even when dealing with municipal power despite the fact that there is no theoretical basis for it. Certainly this different treat-

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[463] 3 J. FARRELL, FARRELL-ELLIS OHIO MUNICIPAL CODE § 1.59 (11th ed. 1962) suggests a broad scope for state power which was used in support of a similar view in Brief for Appellee at 24.

[464] State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 5, 27 N.E.2d 773, 775 (1940) (confirming earlier decisions); Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 37 (1948). The danger as noted by these authors (at 65) is increased when not limited to creation of state agencies.

[465] Casey v. Youngstown, 9 Ohio App. 2d 246, 224 N.E. 2d 155 (1967).

[466] This interest is clearly recognized as part of the municipal police power. Cleveland v. Terrill, 149 Ohio St. 532, 80 N.E.2d 115 (1948); State *ex rel.* Moock v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583, *cert. denied*, 280 U.S. 578 (1929); Dayton v. Jacobs, 120 Ohio St. 225, 165 N.E. 844 (1929).

[467] Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617, *cert. denied*, 305 U.S. 621 (1938). No general limitation on municipal power was to be implied from the creation of the Public Utilities Commission. Nor was the establishment of the Board of Liquor Control treated as establishing an exclusive regulatory agency, Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944), even though the courts have applied "conflict by implication" most frequently in this field. *See generally* Note, *Municipal Control of Liquor in Ohio*, 12 W. RES. L. REV. 377 (1961).

[468] 96 OHIO LAWS 79 (1902), OHIO GEN. CODE § 4404 (1910).

ment has not placed health beyond municipal competency and within exclusive state jurisdiction.[469] However, the claim that the state has the power to become exclusive is not devoid of support. The clearest support is found in the unnecessary references to "withdrawn" municipal power in state power cases,[470] and where municipal power was in issue preemption has made its appearance in lower court decisions.[471] Yet, at similar times so has "no conflict"[472] made an appearance. With this variegated picture in view, it is difficult to reach a judgment that a firm independent theory of "statewide concern" has been introduced judically into the state-municipal power structure.

As a preliminary to considering the *Painesville* decision in this "statewide concern" setting, two further problems most close to *Painesville* in fact pattern or in point of time must be examined.

g. Public Utilities

Municipal regulation of utilities has been considered earlier,[473] but of significance here is the fact that at times the courts have noted the extraterritorial aspects of the services such utilities perform. The courts have done this to support state regulation of the utilities through the Public Utilities Commission in face of exclusive municipal power, local self-

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469 Casey v. Youngstown, 9 Ohio App. 2d 246, 224 N.E.2d 155 (1967); Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 61-62 (1948). Probably State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940), comes closest to an exclusive approach because of the court's strong statement concerning the withdrawal of municipal power. Yet, a state power question of the internal management of an independent state agency was involved, rather than the question of the power of a municipality to regulate health matters; and "no conflict" considerations were not entirely absent. Mention of exclusive state power in the health field was made in an early lower court case. Baldwin v. Newark, 65 WEEKLY L. BULL. 131 (Newark Mun. Ct. 1920).

470 State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946). Support for this claim is also found with other theories of state power including preemption in an overly expansive opinion; Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931).

471 Security Sewage Equip. Co. v. Beebe, 5 Ohio Misc. 178, 214 N.E.2d 853 (C.P. 1965) (dictum), relying on State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962); Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946). The last case is not devoid of a "no conflict" approach involving a state designated agency and presenting an alternative ground for decision. No preemption was found in Davis v. McPherson, 72 Ohio L. Abs. 232, 132 N.E.2d 626 (Ct. App.), *appeal dismissed*, 164 Ohio St. 375, 130 N.E.2d 794 (1955).

472 The basic decision of Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929), spoke of "no conflict" while stressing a state withdrawal power. *See also* Hecker v. State *ex rel.* Cleveland, 111 Ohio St. 168, 144 N.E. 700 (1924) (involving a dispute between two municipalities in the exercise of state authorized power); Casey v. Youngstown, 9 Ohio App. 2d 246, 224 N.E.2d 155 (1967) (although "plenary" state power was mentioned); Cleveland v. Mulloff, 28 Ohio L. Abs. 324 (Ct. App. 1938).

473 *See* textual discussion accompanying notes 170-93 *supra.*

government, claims[474] or to note the interference local regulations have on the total operation of the utilities.[475]

The concern each of these cases evidences over the degree of municipal interference with utility operations which might be tolerated is clearly present even in *Perrysburg v. Ridgway*,[476] where, in the process of making an essentially local self-government finding, the majority noted that total prohibition of intercity utility use of municipal streets was not involved.[477] The dissenter, in directing his attention largely in response to what he feared to be a "walled city" result of a finding of exclusive municipal power, nevertheless stressed the undue interference with a utility's use of the streets that results when designation of pickup and discharge stations for intercity passengers of a motor bus line are subjected to municipal control.[478] Yet, he suggested municipal route prescriptions would be proper.[479] Both acceptable regulation, falling short of material interference with the efficiency of the utility's operation,[480] and unacceptable regulation, violating such a guideline, have been found.[481] Although these cases are subject to different interpretations, they suggest at most a shift from exclusive municipal power of local self-government[482] to mutual state-municipal power to impose police regulations.[483] They do not establish exclusive state power to promulgate regulations with intercity effect,[484]

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[474] State *ex rel.* Wear v. Cincinnati & L.E.R.R. 128 Ohio St. 95, 190 N.E. 224 (1934) (no loss of state power); Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925).

[475] State *ex rel.* Wear v. Cincinnati & L.E.R.R., 128 Ohio St. 95, 190 N.E. 224 (1934); Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N.E. 694 (1925); Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923); Eastern Ohio Transp. Corp. v. Bridgeport, 44 Ohio App. 433, 185 N.E. 891 (1932, *appeal dismissed*, 126 Ohio St. 238, 184 N.E. 852 (1933).

[476] 108 Ohio St. 245, 140 N.E. 595 (1923).

[477] *Id.* at 259, 140 N.E. at 599.

[478] *Id.* at 262, 140 N.E. at 600 (dissenting opinion).

[479] *Id.* at 263, 140 N.E. at 600 (dissenting opinion).

[480] Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925); Eastern Ohio Transp. Corp. v. Bridgeport, 44 Ohio App. 433, 185 N.E. 891 (1932), *appeal dismissed*, 126 Ohio St. 238, 184 N.E. 852 (1933). Municipal regulation of intercity truck routes through the municipality was held reasonable in Niles v. Dean, 25 Ohio St. 2d 284, 268 N.E.2d 275 (1971) and Cincinnati Motor Transp. Ass'n v. Lincoln Heights, 25 Ohio St.2d 203, 267 N.E.2d 797 (1971).

[481] Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N.E. 694 (1925).

[482] Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923).

[483] Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925). *See* textual discussion accompanying notes 184-93 *supra*. *See also*, Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 55-57 (1948); Hitchcock, *Ohio Ordinances in Conflict with General Laws*, 16 U. CIN. L. REV. 1, 38 (1942); Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 311 (1960). Municipal regulation of intercity truck routes was sustained on a police power theory. Niles v. Dean, 25 Ohio St.2d 284, 267 N.E.2d 275 (1971); Cincinnati Motor Transp. Ass'n. v. Lincoln Heights, 25 Ohio St. 2d 203, 267 N.E.2d 797 (1971).

[484] A constitutional source of municipal power over motor transportation within the municipality was recognized in Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923); Lorain Street R.R. v. Public Util. Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925), and Eastern Ohio Transp. Corp. v. Bridgeport, 44 Ohio App. 433, 185 N.E. 891 (1932), *appeal dismissed*,

nor is some special theory of state control suggested. Rather, taking into consideration intercity effects, these decisions stand either for invalidating municipal regulations on the traditional police power grounds of "conflict" with state regulations or for transcending the reasonable.

This struggle over the degree of permissible municipal "interference" with increasingly far-flung utility operations refocuses attention on the very core problem raised in *Painesville*—what should be the outer limit of municipal police power or the inner limits of a "statewide concern" concept? The practical difficulties in allowing a varied pattern of local regulations to be applied to the operation of tightly interwoven intercity businesses are becoming more evident. But in counterbalance must be placed the local public's well-being and possible alternatives that are available to a utility to operate within the regulatory scheme without undue hardship.

In the past the balance was struck so as to cause an evident shift from municipal exclusiveness of local self-government to mutual efforts of police power. It might be appropriate to make a new determination that would consider the ever-expanding scope of utility services and would justify some greater state control perhaps, as suggested by the court in *Painesville*,[485] through a "statewide concern" designation or even, as urged by CEI, through exclusive state power.[486] Either would be acceptable as long as the subject matter is outside municipal competency—outside mu-

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126 Ohio St. 238, 184 N.E. 852 (1933), and confirmed with respect to regulation of intercity truck routes in the recent cases of Niles v. Dean, 25 Ohio St. 2d 284, 267 N.E.2d 275 (1971) and Cincinnati Motor Transp. Ass'n. v. Lincoln Heights, 25 Ohio St. 203, 267 N.E.2d 797 (1971). However, a statutory source, OHIO GEN. CODE § 614-86, now OHIO REV. CODE ANN. § 4921.04 (Page 1953), was apparently relied on in Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N.E. 694 (1925) decided the same day as the *Lorain* case, *supra*. This variance was no doubt in part due to the manner in which the 1923 statute was phrased; first it vested the PUC with power to supervise and regulate motor transportation companies "to the exclusion of all local authorities" except for later provisions, then it provided that the PUC prescribe rules "notwithstanding the provisions of any ordinance . . . or permit . . . enacted . . . or granted by any incorporated city or village" and in case of conflict the "regulation of the public utilities commission shall . . . prevail." Finally, however, it was stated that "local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this chapter." 110 OHIO LAWS 214-15 (1923). These provisions were applicable only to intercity lines, as intracity lines were excluded from PUC jurisdiction at the same time by OHIO GEN. CODE § 614-84, now OHIO REV. CODE ANN. § 4921.02 (Page Supp. 1970). The question of source of power was reserved in Sylvania Busses, Inc. v. Toledo, 118 Ohio St. 187, 160 N.E. 674 (1928). In the later case of Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617, *cert. denied*, 305 U.S. 621 (1938), it was thought that no general limitation on municipal power was to be implied from the creation of the PUC, and in Cleveland v. Public Util. Comm'n, 130 Ohio St. 503, 512, 200 N.E. 765, 769 (1936), municipal power over motor transport corporations was found to be "subordinated" to that of the state, in a situation where municipal consent requirements for intracity lines or lines within continguous municipal corporations now contained in OHIO REV. CODE ANN. § 4921.05 (Page 1953), were found inapplicable.

485 15 Ohio St. 2d 125, 129, 239 N.E.2d 75, 78 (1968).

486 Brief for Appellee at 25. It is impossible to tell whether the moderation of exclusive language in OHIO GEN. CODE § 614-86, now OHIO REV. CODE ANN. § 4921.04 (Page 1953) was felt necessary or just convenient.

nicipal interest. But as has been seen, as long as substantial local considerations remain,[487] greater control could create repercussions extending well beyond *Painesville*. Exclusiveness would reintroduce what would still appear to be a basic error of approach, that of a division of power where a division is not realistic. *Ridgeway*, no doubt, suggested too much power for a municipality; but a full swing of the pendulum to exclusive state power would result in ignoring local considerations and would thus unduly constrict the outer limit of municipal power.

An expansion of state authority, particularly when based on the shifting sands of "statewide concern," is not likely to be an adequate safeguard against the ultimate loss of local interests. Yet, retention of a mutual power approach embracing as it does flexible restraints on the use of power, both from the "no conflict" concept and from the standard of reasonableness,[488] lessens the rigors of conceptualism. This adaptability suggests that the municipality should not be found to lack or to have only diminished power, but rather suggests that under modern conditions the limits on the exercise of municipal power ought to be given close judicial scrutiny.

h. Recent Authority

Despite the sorting of cases into a variety of categories that has been used in this general examination of matters of "statewide concern," no category has really included the decision of *State ex rel. McElroy v. Akron*.[489] This case centered on the state's power to deal directly with municipalities by prohibiting them from imposing a license fee upon watercraft on municipally owned waters—a clearcut "general laws" problem. The court's reference to "statewide concern" raised the question of whether a "statewide" designation affects the "general laws" concept. At the same time, the court's approach suggested drawing a new area of regulation into the orbit of "matters of statewide concern," not as an area of exclusive state power, but as one of curtailed municipal power. These circumstances as well as the case's relative recentness underscore its potential importance to municipal Home Rule. Yet, as previously noted, the *McElroy* case is really not a preemption case[490] nor is it any more clearly a "statewide concern" case. It seems to gather its greatest support from the state's power over municipal tax matters.[491] But even if it were treated as a key case for future "statewide concern" decisions, it falls short of delineating clearly

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487 *See* textual discussion accompanying notes 135-43, *supra*.

488 *See* State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960); Hooley, *Compulsory Underground Wiring—A Battle Rejoined in Public Utility Law*, 5 VILL. L. REV. 80 (1959).

489 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962).

490 *See* textual discussion accompanying notes 226-30 *supra*.

491 173 Ohio St. at 195, 181 N.E.2d at 30.

the extent of expansion of state power which should result from such a finding.[492] *McElroy* could be significant, however, with respect to the development of a definition for a matter of "statewide concern." The court confirmed previous suggestions that changing times can cause a particular area of regulation to take on state importance and to shift to a matter of "statewide concern" when formerly it might not have been one.[493] The mixed blessing of practical flexibility is thus established in a definition which has not been marked by its concreteness, but the extent of the extraterritorial effect necessary to be "statewide" remains clouded.[494]

B. *Statewide Concern—The Painesville Case*

The theory of "statewide concern" was of crucial importance both in the manner in which the *Painesville* case was argued[495] and in the court's ultimate decision.[496] *Painesville*, like *McElroy*, raised a "general laws" problem—state exercising of direct control over a municipality in a "statewide concern" context. Also like *McElroy*, it involved an area of regulation previously thought to be within municipal police power, which had received little "statewide concern" treatment. But unlike that decision, *Painesville* was not encumbered with controlling tax considerations.

1. Exclusive or Enhanced State Power

Counsel for CEI squarely faced the issue of using "statewide concern" as a designation for matters entirely beyond municipal Home Rule. They urged that in such matters the state was in complete control and that the only authority a municipality could exercise was that delegated to it by the state and subject to the state's direction.[497] Consequently, it mattered not at all whether § 4905.65 was a "general law," since the state held full power to grant, modify, or deny power in this area.[498] Reliance was placed upon the principal cases already discussed including those which involved state power over creation of courts,[499] location of state highways and bridges,[500] creation of independent subdivisions,[501] and development of de-

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[492] Preemption is mentioned both with respect to tax, *id.*, and licensing, (syllabus) but "no conflict" is linked with "statewide concern." *Id.* at 194, 181 N.E.2d at 30.

[493] *Id.* at 192, 181 N.E.2d at 28; Blume, *supra* note 456, at 544.

[494] The court noted that when the use of an item subject to regulation had become statewide and there was a need for uniform standards of regulation, local limitations become a harassment, *id.* 173 Ohio St. at 193, 181 N.E.2d at 29, but it supplied no guidelines for ascertaining the presence of these circumstances.

[495] Brief for Appellee at 25-33.

[496] 15 Ohio St. 2d at 129, 239 N.E.2d at 78.

[497] Brief for Appellee at 25.

[498] *Id.* at 25, 29, 32.

[499] State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929); Brief for Appellee at 29.

[500] Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 239 (1960); State *ex rel.* Ohio

tachment guidelines[502] as well as *State ex rel. McElroy v. Akron.*[503] In adopting a "statewide" approach in *Painesville* the court seemed to treat it as an independent concept within municipal police power, since the opinion failed to adopt or at least failed to make clear that it relied upon an exclusive state power rationale;[504] and as has been considered before,[505] the court found that the state had the authority to remove[506] or exclude[507] a municipality from this area of regulation and to place local matters within municipal competency.[508]

These two positions present an intriguing intermixture of theories, each of which in its own way can pose a serious threat to municipal Home Rule. CEI's contention is solidly based on an outer limit of municipal police power approach because it concludes that municipal Home Rule power is "local" and that which is not local is beyond Home Rule. Yet it suffers from a paucity of judicial precedent. "Statewide concern" has been infrequently used to denote a total lack of municipal power.[509] Areas where exclusive state authority has been recognized have generally been characterized by minimal municipal interest and delineated by grants of specific constitutional authority to the state.[510] The court, on the other hand, seems to presuppose municipal power, which the state "excludes." This suggests an independent "statewide concern" concept, since it is difficult to explain the source of this municipal power if "statewide concern" is essentially a state area.[511] Yet, in recognizing a state exclusionary power the

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Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied*, 344 U.S. 865 (1952); State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927); Brief for Appellee at 30-31.

501 State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Brief for Appellee at 27.

502 Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); Brief for Appellee at 26-27.

503 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962); Brief for Appellee at 31.

504 But again at the request of CEI, the court did in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C.P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971), finding municipal power to regulate intercity transmission lines was statutory and not part of Home Rule (at 10).

505 *See* textual discussion accompanying notes 273-90 *supra.*

506 15 Ohio St. 2d at 130, 239 N.E.2d at 78.

507 *Id.* at 131, 239 N.E.2d at 79.

508 *Id.* at 130, 239 N.E.2d at 78.

509 *See* textual discussion accompanying notes 373-80 *supra;* Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

510 *See* textual discussion accompanying notes 373-74 *supra.*

511 Although the court made reference to statutory authority of a municipality in this area in State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959), *appeal dismissed*, 362 U.S. 457 (1960), and in Cambridge v. Public Util. Comm'n, 159 Ohio St. 88, 111 N.E.2d 1 (1953), the source of authority was not in issue and it could hardly be solely statutory, *see* note 181 *supra.* Judge Williams in State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) (concurring opinion), had suggested that the "necessity" of the situation provided the source.

court failed to offer any explanation to clarify the puzzling problem of what are the constitutional moorings for an independent "statewide concern" concept.

Nor would the theoretical basis of the decision be any clearer if a state exclusionary power were based upon the presence of changing circumstances[512] which would transform a matter from one of local to one of state concern. Such state action would serve to identify a transition, but would leave unresolved the question of whether legislative exclusion would be necessary to effect a transition. Moreover, the possibility that such a power would be permitted to expand beyond its confirming role to one of initiating a transition is evident. Even so, a finding of state authority to exclude or withdraw municipal power follows precedent more closely than does the position advocated by CEI.[513]

2. Scope of the "Statewide Concern" Concept

CEI's brief also suggested a method of determining the scope of application of the doctrine it urged be adopted. A matter of "statewide concern" would be one whose regulation is of "direct and immediate" concern outside the boundaries of the municipality.[514] It was not urged that a municipal regulation having any effects on nonresidents be struck down[515] and it was noted that § 4905.65 carefully protects "local" regulatory power while it removes "extraterritorial" power.[516] This, of course, recreates the dilemma of *Ridgeway*[517] and in substance that of all "statewide concern" cases. This test does not define "statewide concern" in terms of the application of regulations or by the nature of the subject matter, but rather in terms of the effect of the regulations. Thus, municipal regulations fail, although they apply only within the municipality, if they have "direct effects outside it." A contrary result is reached even though an intercity business is regulated if the effects outside are indirect or remote. The search for what is "state" and what is "local" takes on little more clarity when turned into an exploration for what is a "direct" or an "indirect"

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512 A fact noted by the court, 15 Ohio St. 2d at 129, 239 N.E.2d at 78, in its reliance on State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962).

513 *See* textual discussion accompanying notes 354-80, *supra.*

514 Brief for Appellee at 25. The additional argument that the matter was of "statewide concern" because the state found it necessary to regulate it, *id.* at 32, can be given no more credence than deference to legislative judgment permits.

515 Although omitted from appellee's brief for the supreme court, CEI in its brief for the court of appeals also conceded that a matter was not of "statewide concern" simply because it would affect non-residents physically present or present through the ownership of property in the regulating municipality. Brief for Appellee at 58, Cleveland Elec. Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967).

516 Brief for Appellee at 32-33, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

517 Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923).

effect on outsiders.[518] The outer limit of autonomous municipal police power is thus made dependent upon uncertainty, but more significantly, an uncertainty which results in the denial of municipal power as is shown both by the expression of the test itself and by judicial precedent in the utility field.[519]

The *Painesville* court evidenced more respect for the presence of municipal power; but in response to the problem of defining what constitutes a "statewide concern," it developed a formula for restraining this power which, because of its breadth of statement, presents an even graver source of potential danger to the future of Home Rule in Ohio. The court relied upon the precedent of *Beachwood v. Board of Elections of Cuyahoga County*.[520] If the results of the legislation affect only the municipal corporation with "no extraterritorial effects," the matter is for municipal control. If the results are not so confined the matter is for the General Assembly.[521]

Taken literally this approach would mean the end of Home Rule in the police power area, for few if any regulations have *no* outside effects. Yet, if based on the precedent of *Beachwood*, why should this approach cause concern? Regardless of the validity of this test in *Beachwood*, it is submitted that the circumstances of that case are clearly distinguishable from those found in *Painesville*. The *Beachwood* decision involved essentially an exclusive state area and could have been based on the limited issue of the territorial application of the municipal regulation. Annexation and detachment in a very real sense have extraterritorial application and not just effects. To rule out all extraterritorial application is fully consistent with Home Rule as it is generally understood, but to rule out all internal regulation if it has "any" outside effects is quite another matter. The result is that autonomous municipal police power again is held at the discretion of the state. This conclusion goes beyond what was urged by CEI, even though *Beachwood* was cited in its brief.[522]

The court apparently sought to modify some of the harshness of the application of *Beachwood* by stating that even though a matter is of local concern, if it affects those outside of the municipality *more* than it does those within, in this case as a consequence of changing circumstances, it is then a matter of statewide concern.[523] This statement cannot be har-

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[518] For example, the extraterritorial effects on an intercity business resulting from municipal regulation of transient vendors, upheld in West Jefferson v. Robinson, 1 Ohio St.2d 113, 205 N.E.2d 382 (1965), were distinguished from the *Painesville* facts. Brief for Appellee at 58, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967). Suggested as a "local" matter in Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio*, 32 U. CIN. L. REV. 92, 107 (1963).

[519] *See* textual discussion accompanying notes 473-84 *supra*.

[520] 167 Ohio St. 369, 148 N.E.2d 921 (1958).

[521] 15 Ohio St. 2d at 129, 239 N.E.2d at 78.

[522] Brief for Appellee at 25-26.

[523] 15 Ohio St. 2d at 129, 239 N.E.2d at 78.

monized with the previous one, which places a regulation with *any* outside effect within the province of the General Assembly. Certainly the appearance of both of these statements in the same opinion cannot clarify an already confused situation. Even if this still restrictive modification becomes accepted as the intended version,[524] it is little more workable than CEI's suggested "direct" effects approach. How is the court's balance between outside and inside effects to be struck? The judicial process involves making judgments, but the *Painesville* approach creates a highly subjective test or at least one easily susceptible of being so applied. Both legislators and councilmen are left without clear guidelines and Home Rule hangs in the balance. To return to an even more basic criticism, the court's formula forces a choice between state power and local power with respect to a matter which is defined in terms of both state and local interest.[525] Since the state interest has become "more" than the local interest in the modern setting, the state can entirely "exclude" the local. Expanding state needs hardly justify so stolid a resort to conceptualism.

Having expressed concern over the breadth of the court's statements in *Painesville* it is appropriate to recall the context in which they were made—the facts of the case itself. Only intercity power lines were involved.[526] Section 4905.65 is tailored to fit this circumstance and to serve as a limit on municipal regulations only if these intercity lines are constructed according to safety standards and pose no unreasonable threat to the welfare of the inhabitants of the municipality.[527] These limitations serve as a tempering influence on the opinion, create an inner limit on the scope of "statewide concern," and preserve much initial local power over important local effects of the construction of such lines including, as noted by the court, some local planning commission control.[528] Yet, § 4905.65

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524 Both statements appear in the quotation included in Walton Hills v. Cleveland Elec. Illuminating Co., No. 884,475 (Cuyahoga County C. P. Oct. 29, 1970), *aff'd*, No. 30,869 (Ct. App. 1971), *appeal dismissed*, No. 71-621, Ohio Bar 1275 (S. Ct. Oct. 18, 1971). But no reference was made to either statement when the shifting of truck traffic from one community to protect residential interests to the congested and more heavily populated area of another was sustained in Cincinnati Motor Transp. Ass'n v. Lincoln Heights, 25 Ohio St. 2d 203, 267 N.E.2d 797 (1971).

525 See 15 W. RES. L. REV. 812 (1964).

526 15 Ohio St. 2d at 131, 239 N.E.2d at 79.

527 (B) To the extent permitted by existing law a local regulation may reasonably restrict the construction, location, or use of a public utility facility, unless the public utility facility: (1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and (2) Is to be constructed in accordance with generally accepted safety standards; and (3) Does not unreasonably affect the welfare of the general public.
OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1970).

528 15 Ohio St. 2d at 131-32, 239 N.E.2d at 79. Compliance with overall plans might be sought and a utility proposal rejected if the standards of section 4905.65, Revised Code, were not met. For the position of CEI on the applicability of planning ordinances, *see* note 167 *supra*. For "statewide concern" decisions in which state authority exercised through public bodies was found superior to local planning and zoning regulations, *see* State *ex rel.* Ohio

has removed from municipal councils the power to make the basic decision to search for ways to reconcile community and utility interests within the framework of reasonableness. Accommodating an essentially progressive step for the welfare of the community with the interference it might cause public utility operations is foreclosed. Even the vitality of specific facts and restrained legislative action as mitigating factors depends upon the care with which future legislatures and courts observe their importance.

C. *State's Need for Enhanced Power*

1. In *Painesville*

It seems evident that the state could readily have dealt with the problem of underground high voltage transmission lines without need to resort to any denial of municipal power or to the use of statutory provisions which are clearly susceptible of that interpretation. A uniform treatment of the problem geared to the engineering and economic facts of life could have been achieved through authorizations to electric companies upon stated conditions or with the establishment of guidelines for such construction or with a combination of approaches. Local regulations reflecting local interests would not have been precluded. Restrained by the requirements of reasonableness and "no conflict" with general state guidelines, it is not likely that these local regulations would become burdensome. An acceptable accommodation of interests could have resulted.

2. In General

These considerations raise the more general issue of how imperative it is for the state to have even a limited power to deny municipal authority. How important is it for the state to achieve either uniformity of regulation or to create a vacuum from regulation by clearing a field of municipal regulation?

State preemption or denial of power is not unknown in the field of municipal government in this country.[529] In theory the need to have the power to deal with a matter completely unencumbered by municipal actions, as distinguished from the ability to exercise superior authority, may be postulated; but as in *Painesville*, the practical necessities for such a power have not been clearly established. It would seem that the state should ordinarily be able to accomplish what it wants through the present state-municipal corporation power structure—through constitutionally pro-

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Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied*, 344 U.S. 865 (1952); State *ex rel.* Ellis v. Blakemore, 116 Ohio St. 650, 157 N.E. 330 (1927); Heath v. Licking County Regional Airport Authority, 16 Ohio Misc. 69, 237 N.E.2d 173 (C.P. 1967); State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (C.P.), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948).

[529] I C. ANTIEAU, MUNICIPAL CORPORATION LAW § 3.06, at 109-111 (1968).

vided "no conflict" provisions. Without imposing a complete bar to municipal regulation or appreciable limitations upon citizens, a considerable curtailment of local regulations can be achieved by affirmative state grants of authority and, to a lesser extent, by broad licensing measures.[530] Uniformity of state regulation can be advanced substantially by comprehensive treatment of a subject either directly through legislative enactment[531] or by means of state regulatory agencies operating under broad jurisdictional grants,[532] even without the aid of the "conflict by implication" theory which broadens the effect of the prohibitory regulations.[533] Analogous municipal regulations are likely to be conflicting or superfluous. Should these legislative capabilities themselves be thought too injurious to municipal interests, provision can be made for full consideration of these interests through the vehicle of public hearings or some similar procedure.[534]

The cost of those limited instances when the "no conflict" approach would not permit the state to achieve its purpose fully must be measured against the positive advantages of shared power. Aside from preserving local autonomy, of not minor significance is avoidance of the difficulties of drawing lines of demarcation between municipal power and the new state power to deny. An examination of the facts of a "conflict," concretely presented in a case, is not replaced by a theoretical exploration into the nature of an area of regulation. Such a search raises the problem of reaching beyond the circumstances of the case to examine hypothetical conditions which might delimit the area. On the other hand, if such lines were drawn and an unrealistic conclusion were reached, the unsettling prospect of future frictions and countershifts arises. Legislative lobbying, reminiscent of pre-Home Rule days, involving tests of the relative strengths of municipalities and those they seek to regulate, is an almost necessary consequence. A redress of the inequities of a decision validating a statutory denial and further denials of power will be sought of the legislature. How content will those regulated be if a new forum of appeal is opened to them, and how comfortable will a municipality be with a division line which leaves substantial local interests in the hands of the state?

D. *Conclusions*

1. Effects of *Painesville*

In the final analysis the *Painesville* decision has given new impetus to "statewide concern" as an independent concept within police power. The

530 Anderson v. Brown, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968).

531 *E.g.*, OHIO REV. CODE ANN. ch. 4511: Traffic Laws—Operation of Motor Vehicles.

532 *E.g.*, OHIO REV. CODE ANN. § 4301.03 (Page 1965) which places the power to adopt rules and regulations in the liquor control commission of the state.

533 Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944).

534 *E.g.*, OHIO REV. CODE ANN. § 5511.01 (Page 1970) which provides for public hearings before establishing additional, or expanding existing, highways as part of the state highway system.

area of exclusive state power was not advanced despite the urgings of CEI. However, direct state control over a municipal exercise of the police power was sustained. The only restraint imposed was that municipal action must have *some* external or perhaps *more* external than internal effects. This did not occur as a result of an effort to forestall claims of exclusive municipal power, nor as a consequence of a state desire to regulate through conferral of jurisdiction upon a state agency, but as a reflection of legislative concern to prevent a type of local regulation. A new area of continuing municipal concern was thereby opened to "statewide" treatment by the *Painesville* decision, since prior cases recognizing a municipal interest in the regulation of public utilities failed to establish a basis for such a finding. Support for its rationale is available primarily from decisions in the health field, while those cases involving areas of special state concern should not be considered of direct precedential value for this broader application.

The extent of the expansion of state power is limited by the specific facts of *Painesville* and by the detailed provisions of § 4905.65. Given this restrained statute, the disruptive effect of the local ordinance upon the utility, and previous indications of broadened state power, the *Painesville* result should not come completely unexpected. Yet, the court's reliance upon the expansive implications of the *McElroy* and *Beachwood* decisions suggests, if it does not compel, the further lessening of municipal autonomy in the future.

2. Effects of the "Statewide Concern" Concept

Viewed in its larger perspective, "statewide concern" has proved to be an illusive concept. Aside from meaning that the state has exclusive power in areas of special state interest, it is also suggestive of exclusive state power as an outer limit to municipal police power. Logically sound, but potentially dangerous to municipal Home Rule if restrictively applied, this role has been largely ignored by the courts.

As a theory of expanded state power "statewide concern" still struggles for existence—for a constitutional base, for definition and scope or identity, and even for purpose. The need to use the "statewide concern" concept to fill state requirements for enhanced power over what is given by the "no conflict" approach is not established. State denial of constitutionally granted power is deservedly suspect, even if of limited application. But lines separating the theory of enhanced state power from municipal authority on the one hand and presumably from exclusive state power on the other are woefully faint, although they are essential as limits to and for the very identification of the concept. Over the years precedent has given little aid in determining where these lines should be traced. Practical difficulties abound if territorial application of a municipal regulation

approach is discarded and they reach the point of seriously questioning the basic premise that matters of modern concern lend themselves to division.

As a consequence, it is difficult to consider "statewide concern" as an acceptable theory for the denial of municipal power—filling the intermediate role both of preserving as much municipal autonomy as possible and of securing needed state power. With the very nature of the concept still clouded and controversial, it must be said that "statewide concern" remains a cluster of results devoid of a unifying rationale.

IX. What Effect does this Apparent Increase of State Power have upon the Solution of Metropolitan Area, As Distinguished from Municipal, Problems?

A. *Dimensions of Enhanced Power*

Taken literally the *Painesville* decision enables the state to exclude[535] municipal corporations from the regulation of any matter which has become of "statewide concern" because its regulation affects people outside the municipality more than it does those within.[536] Within this test the state can create a vacuum to meet metropolitan area regulatory needs, ranging from air and water pollution and mass transportation problems to establishing crime detection and planning programs. Moreover, the expansiveness of the decision tends to confirm the broader implications of earlier decisions, which would otherwise properly be restricted to a particular subject of regulation, a particular form of regulation, or a less comprehensive degree of state interference. As a consequence of these implications, it can be contended that the state can withdraw such power from a municipality[537] and vest it in a special district[538] or some other agency of the state's choosing,[539] including perhaps some form of multifunction area government unit. The municipality might be compelled to contribute to the expense of operation of such units.[540] The state could also achieve an area objective by ordering a municipality to curtail its actions[541] or to undertake some function[542] under the direction and supervision of state officials.[543] This most expansive interpretation of *Painesville* represents a

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535 15 Ohio St. 2d 125, 131, 239 N.E.2d 75, 79 (1968).

536 *Id.* at 129, 239 N.E.2d at 78.

537 Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929).

538 State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940).

539 State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Op. 58, 79 N.E.2d 698 (C.P.), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694 (Ct. App.), *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948).

540 State *ex rel.* Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 134 N.E. 686 (1921).

541 Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929).

542 Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941).

543 State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941).

considerable enhancement of state power and a commensurate reduction of municipal power, if not in specific holding, certainly in the confirming role the decision might be felt to occupy by some future court.

The justification or wisdom for making such an adjustment of state-municipal power, primarily from the standpoint of its affect on municipal power, has been considered in the development of this article. If not considered a change in the constitutional distribution of power, as it certainly seems to be, it is at least a shift in emphasis in the approach that has been developed through the years. Such modifications open up the possibility for both the legislature and the courts to make further adjustments uninhibited by prior conceptions of constitutional restraints. This freedom of action is enhanced by the difficulty in developing sharp lines of distinction when applying the rule of *Painesville* and affords the state greater power if in the examination of the effects of a municipal regulation it is found to affect those outside "more" than those within the municipality.

This section will present a consideration of the justification the *Painesville* decision might find and the use to which enhanced state power might be put in the solution of metropolitan area problems on an area basis.

B. *Additional or Enhanced Units of Government*

Reduced to its most fundamental terms the conclusion to be garnered from the potentialities of *Painesville* is one of increased or at least confirmed state power vis-à-vis municipalities. This in turn supports the conclusion that solutions to metropolitan area problems have been made easier insofar as such solutions are dependent upon the scope of state power.[544] Certainly the creation by the state of a separate viable unit of government to govern a metropolitan area[545] would be facilitated by the *Painesville* decision; the state could withdraw function from municipalities and bestow them upon such a government free from municipal interference through not just conflicting regulations but supplemental ones as well. Creation of special purpose districts would be similarly advanced,[546] even though this might not prove to be all to the good. By definition such districts are usually limited to carrying out a single or at most a few

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[544] *See generally* N. LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE (1962).

[545] Created whether or not with popular vote confirmation, in a unitarian or federal form, and presumably within constitutional restrictions that "laws, of a general nature, shall have a uniform operation throughout the state," OHIO CONST. art. II, § 26, that "[c]orporations . . . be formed under general laws," OHIO CONST. art. XIII, § 2, that no new county be created requiring the vote of "the electors of the several counties to be affected," OHIO CONST., art. II, § 30, and that the resulting unit of government would be distinguishable from a "municipal corporation" and would not enjoy the Home Rule protections of Article XVIII of the Ohio Constitution. *See generally* J. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTION OF METROPOLITAN AREA PROBLEMS (1961).

[546] These range from mosquito control districts, OHIO REV. CODE ANN. § 6115.24 (Page 1953) to port authorities, OHIO REV. CODE ANN. § 4582.02 (Page Supp. 1970).

related functions[547] and, therefore, they tend to increase the problems of proliferating governmental units[548] more than would a broader multipurpose metropolitan government. The ease with which the state might make use of a municipal corporation as its agent in obtaining areawide objectives might also be enhanced as a consequence of *Painesville*.

C. *Safeguards for Local Decisions?*

Every increase of power should be accompanied by thoughts as to the wisdom of its use. Perhaps the most significant consideration involved here is that of local autonomy. State withdrawal of authority from municipalities or the direction of them amounts to state imposed solutions to problems. Accepting the presence of area problems in need of solution and, at least for the purposes of argument, the need to limit municipal power in order to arrive at solutions, it does not follow that the solutions ought to be left completely in the hands of the state. If state actions is to be the only available approach, today's area citizens are in much the same position as municipal citizens prior to 1912. They would be without voice in meeting the difficulties which beset them. Some form of area control over area problems is needed—Area Home Rule, if you please. It is beyond the scope of this article to explore all the difficulties besetting such an approach, and they are many.[549] Not the least of these is the spector of the increased complexities which would result from a possible three levels of government, or four, if the ever-expanding role of the federal government is taken into account. Yet, despite these difficulties a sufficient case can be made for autonomous area government to cause hesitation in accepting as adequate a simple increase of state power which, at the expense of municipal autonomy, bears no inherent limits for the preservation of area autonomy.

The creation of special districts is usually marked by the failure to provide for effective popular control.[550] The use of the municipality as a state

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[547] *E.g.*, Sanitary districts may be established for any of the following purposes:

(A) correct the pollution streams;
(B) clean . . . stream channels for sanitary purposes;
(C) regulate the flow of streams for sanitary purposes;
(D) provide for the collection and disposal of sewage . . .
(E) provide a water supply for domestic, municipal, and public use . . .
(F) exterminate or prevent mosquitoes . . . and abate their breeding places . . .
(G) collect and dispose of garbage;
(H) collect and dispose of any other refuse that may become a menace to health.

OHIO REV. CODE ANN. § 6115.04 (Page 1953).

[548] J. BOLLENS & H. SCHMANDT, THE METROPOLIS 172-75 (1965). *See generally* M. POCK, INDEPENDENT SPECIAL DISTRICTS: A SOLUTION TO THE METROPOLITAN AREA PROBLEMS (1962).

[549] *See* J. BOLLENS & H. SCHMANDT, *supra* note 548, at 439-90.

[550] *Id.* at 173. *E.g.*, a petition of 500 or a majority of freeholders in a proposed district to the common pleas court of the county to establish a sanitary district initiates the procedure. OHIO REV. CODE ANN. § 6115.05 (Page 1953). A director of the district is to be appointed by the judge of the common pleas court of each county having territory within the sanitary district. OHIO REV. CODE ANN. § 6115.10 (Page 1953). A somewhat more acceptable situ-

agent in area matters also suffers from an absence of local autonomy. The municipality, although gaining extraterritorial power, would ordinarily be under state direction as to how to use it; while the inhabitants of the area affected would be under state control, even though indirect. If municipal power were to be enhanced by the authorization of the exercise of discretion it would result in a commensurate loss of influence by area inhabitants. Instead of a state-imposed solution concerning which area inhabitants would have some, albeit miniscule, voice, there would be a state-initiated solution involving municipal action concerning which the area inhabitants would have no voice.[551]

Creation of metropolitan area governments by the state does not insure local autonomy either, since they might merely be constituted as administrative arms of the state. On the other hand, being sensitive to political pressure or for other reasons, the state might very well vest them with a substantial degree of autonomy. But even then self-sufficiency would not be complete, since it would be subject to the hazards of subsequent legislative alteration or abrogation. This is legislative Home Rule, which is the formula adopted through constitutional provision by a number of states[552] with respect to state-municipal relations and in its broadest aspects could be the ultimate result of the *Painesville* decision for such relations in Ohio. Is it an acceptable approach to state-area relations? This is the crux of a vital policy question.

How much Home Rule is desirable? Legislative Home Rule leaves the ultimate answer to this question up to legislative determination and thereby gains flexibility of approach. Constitutional Home Rule[553] by contrast loses this flexibility by denying this legislative discretion but provides instead a greater safeguard for, if not greater, local autonomy. This conflict of thinking arose with respect to providing for municipal Home Rule at the turn of the century[554] and remains with us with respect to establishing Home Rule for area citizens even in the modern setting. In resolving the conflict, note must be taken of the history of struggle for the maintenance of local autonomy,[555] the frequent disregard by the state

ation exists with respect to port authorities. A municipal corporation by ordinance, or a township or a county by resolution, is authorized to establish a port authority, OHIO REV. CODE A&&. § 4582.02 (Page Supp. 1970), appoint directors, OHIO REV. CODE ANN. § 4582.03 (Page 1965), and dissolve the authority, OHIO REV. CODE ANN. § 4582.023 (Page 1965).

551 *See generally* F. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA (1962).

552 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 3.08 (1968).

553 Or "self-executing" Home Rule, where constitutional provisions are thought to be the source of municipal power without the need or opportunity for intervening legislative action. *Id.* at § 3.01-.04.

554 Witness the two approaches adopted in constitutional provisions, 1 C. ANTIEAU, *supra* notes 552, 553.

555 Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948); Blume, *Municipal Home Rule in Ohio: The New Look*, 11 CASE W. RES L. REV. 538 (1960).

of local interests,[556] and the seemingly endless trend throughout the nation toward centralization of authority. Nor should the case for legislative Home Rule be ignored, given the number of states that have adopted it.[557] Considerations of simplicity and symmetry suggest, though, that whichever Home Rule approach is favored, thought should be given to applying the same approach to both municipal and area units of government.

Neither *Painesville* nor any judicial decision can guarantee even limited Home Rule for metropolitan areas when such Home Rule depends, as it does, on legislative discretion rather than on constitutional provision for alteration and abrogation as well as for its initial vesting. Consequently, the implications of *Painesville* and, to a lesser extent, the decision itself stand for an increase in state power, power that could be used to expedite the solution of metropolitan area problems on an area basis, and a constriction of municipal autonomy without insuring area autonomy. It thus remains a state power decision.

D. *The Future?*

A comprehensive, forward-looking reconciliation of all competing interests is needed. Neither the *Painesville* decision nor judicial action in general can serve such an objective. It can be satisfactorily accomplished only by resort to the more standardized method of amending the Ohio Constitution. Although a constitutional provision is clearly not a panacea, in the interest of all concerned the future of both municipal autonomy and area autonomy ought to be hammered out in the free exchange of popular views that comes in a constitutional convention. A carefully drawn constitutional provision delineating the modern roles of each—municipality, metropolitan area, and state, in relationship with each other as well as with the federal government—would equip the people of the state to meet the needs of the future.[558] The opportunity to seek such a solution is before the voters of Ohio in 1972.[559]

X. CONCLUSION

The Supreme Court of Ohio in the *Painesville* decision sustained the provisions of § 4905.65 of the Revised Code as a state-directed reduction of the reasonable exercise of police power by municipal corporations in an

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[556] *Supra* note 292.

[557] Apparently not with uniformly high success, however. Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 306 n.7 (1960).

[558] A call for similar action was made 23 years ago, Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 71 (1948).

[559] "At the general election to be held in the year one thousand nine hundred and thirty-two, and in each twentieth year thereafter, the question: 'Shall there be a convention to revise, alter, or amend the constitution,' shall be submitted to the electors of the state . . . ." OHIO CONST. art. XVI, § 3.

area of regulation where the extraterritorial effects of its exercise were thought to be greater than the interests internal to the corporation. This holding must be considered to be a "statewide concern" decision. By rendering it the court gave renewed, but limited, impetus to an amorphous concept which fell short of the clarity needed to ensure its continued existence. At the same time, the decision marked still another instance of judicial confirmation of legislative disfavor of municipal Home Rule but did so without providing the means of clearly forecasting the future role of Home Rule of either increasing disfavor or possible regained acceptance. *Painesville* is not a clarion call and will not likely receive the response that such a call would warrant. It is nonetheless an important decision. For it is not only from what was said in the context in which it was said, but also through its unspoken implications that one can discern the weakening of past principles which marks the erosion of municipal Home Rule.

As the cases suggest, there has been no development of a single "statewide concern" theory. References to it have been fitful. Its most frequent use has been to confirm existing state power or to announce a result little different from the traditional one of state superiority in the police power field. The overall scope of its application has not been made clear nor have the effects upon state-municipal relations which are to be derived from it. Yet, without a firm confirmation of municipal power based on intraterritorial application of municipal regulations, a municipality stands vulnerable. The history of "statewide concern" suggests that it can provide a vehicle, no matter how haphazardly equipped, for the expansion of state power either by a definitional limiting of the outer scope of municipal police power or by the development of a theory without constitutional support of state power to exclude or supplant municipal regulation under certain circumstances. It can, in short, be made the instrument of curtailing municipal police power.

The court in *Painesville* chose to use this vehicle apparently not to constrict the scope of municipal police power but to find a state power "to exclude" previously recognized municipal authority to regulate intercity public utilities. In this way the court answered in the affirmative the issue presented of whether state authority in the police power field was sufficient not merely to overturn contradictory municipal regulations but to exclude them entirely without the state itself regulating—to create a regulatory vacuum.

The net effect of such a result, at least with respect to matters of "statewide concern," was to discard the concept of "general laws" as it has been developed in case law. Although § 4905.65 might be considered a general law through a careful process of fitting its provisions into the pattern of right-conferring and regulatory statutes, the court failed to fol-

low this process and its acceptance of the state's power to exclude municipal authority cannot be squared with that approach. Unfortunately, the court by its decision in *Painesville* brought little clarity to the confusion over the scope of an independent "statewide concern" theory. What little was gained by the court's apparent invitation to the broadest of interpretations, through its reliance upon the widest precedential base and by including all matters which had any extraterritorial effects, was fortunately lost by its own modifying expressions and the limiting facts of the case itself.

The facts of *Painesville* and the provisions of § 4905.65 do serve to limit the state's encroachment upon municipal authority, since only intercity electric transmission lines were involved. Municipal power is limited by § 4905.65 only if such lines are constructed according to accepted safety standards and do not pose an unreasonable threat to the welfare of the inhabitants of the municipality. Yet, from another viewpoint, rather than making the decision more acceptable, these factors serve to underscore the decision's real effect. As a consequence of admittedly restrained legislation, the state's judgment of what is reasonable for the protection of local interests has been accepted as a replacement for judicially-confirmed municipal judgment, not in accommodation one with the other, but in the creation of a stifling vacuum of no regulation. Where the reconciliation of interests was possible on the basis of reasonableness, an insensitively uniform solution was accepted instead. It is in this result that the true significance of the *Painesville* decision lies. Rather than furthering intergovernmental cooperation, its acceptance of a state exclusionary power marks a departure from an accommodation of state-municipal power already established through the "no conflict" and "general laws" concepts. The blending panorama of mutual power which forbids denial of municipal authority either expressly or impliedly at one end, but overturns municipal regulations because of "head-on" conflict at the other, with accommodating theories of "conflict by implication" or with felony statutes in between, is disturbed and distorted by this decision.

Thus, even without a clear-cut reappraisal of state-municipal relations, *Painesville* suggests a reordering, not just an updating, of a constitutional distribution of power made nearly 60 years ago. A court brings inherent limitations to such a task including a piecemeal, rather than a comprehensive, approach that does not accommodate itself readily to anticipating the need for adjustments nor to the creation of broad safeguards. But aside from this consideration, the ultimate test of any reordering is the balance to be struck between the practical difficulties in the present allocation of power that can be overcome by change and the new problems which are likely to adhere to a different system; a distribution of governmental power has little significance other than its workability.

First the new vistas opened by a reordering may not be so new at all

because they may well involve answers to old problems which were rejected earlier. In establishing municipal Home Rule the writers of the 1912 amendments felt that in areas of mutual interest state superiority should be recognized, yet each level of government should be able to act. This has produced a reasonably workable system geared to the practicalities of the situation. Was this conclusion wrong, or have circumstances changed so that more state power is needed to the disregard of local determination?[560] It is not intended here to venture into a comprehensive treatment of the extent to which state authority should be enhanced, if at all, or what the new order of state-municipal relations should be, if there is to be a new order. It would seem clear, nonetheless, that the need for a state denial power and the use of "statewide concern" as a means of providing it are questionable in light of the authority the state already possesses and the difficulties a denial power is likely to create, even aside from those accompanying a curtailment of local autonomy. Diligence in drafting regulations to define their purpose clearly and to accommodate them to the interests of the other governmental level will likely obviate the need for a denial power by forestalling any substantial loss of legitimate purpose—be it municipal or state. Certainly a reordering which includes increased state power would give recognition to a wide range of considerations pressuring toward centralization of authority within the state. It would create a greater flexibility of state power over the present system which could be used through superior level direction to advance the solution of metropolitan area problems on an area basis. But as has been suggested, this, without constitutional protection, is not an unmixed blessing if local control over local matters has any validity.

Forecasters of doom are usually wrong, as are those who settle upon the most reprehensible features of a decision as the factors which are likely to provide the most lasting consequences. It well may be that the full implications of *Painesville* will never be reached. Yet, one need not fall into these errors and still assess the *Painesville* decision as at the very least a sizable contribution to the developing pattern of current, if not permanent, Home Rule erosion. It represents a much greater danger than the *McElroy* decision from which it gained strength, cluttered as that decision was with alleviating rationales. Still, the broadest aspects of the *McElroy* case have made their impression in judicial circles. The court's acceptance in *Painesville* of a direct prohibition of the use of municipal police power can have no less effect.

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[560] Despite a testing of the basic motivations for municipal Home Rule, which is a recognized periodic necessity, it should not be concluded that the spark for Home Rule has gone out of the modern world. Notice the not too unserious proposals for the independence not only of Home Rule but for statehood itself which have been made with respect to New York City. Time, June 21, 1971, at 13; National Observer, July 19, 1971, at col. 1; Straus, *Seriously, Why Not Statehood for the City?*, N.Y. Times, Oct. 26, 1971, at 41, col. 3.

To repeat, the *Painesville* decision is not a clarion call for a new state-municipal power division line. But it does suggest such a line, one which plays the role of an intruder within the boundaries of Ohio municipalities.